JAMES S. BURLING, Ariz. Bar No. 009039
E-mail: jsb@pacificlegal.org
M. REED HOPPER, Cal. Bar No. 131291*
E-mail: mrh@pacificlegal.org
JONATHAN WOOD, Cal. Bar No. 285229*
E-mail: jw@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
* *Pro Hac Vice*

Attorneys for Defendant-Intervenors

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TUCSON DIVISION

WILDEARTH GUARDIANS and NEW MEXICO WILDERNESS ALLIANCE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant

and

NEW MEXICO CATTLE GROWERS' ASSOCIATION; NEW MEXICO FEDERAL LANDS COUNCIL; and NEW MEXICO FARM AND LIVESTOCK BUREAU,

Defendant-Intervenors,

and

SAFARI CLUB INTERNATIONAL,

Defendant-Intervenor.

No. 4:13-cv-00392-DCB

NEW MEXICO CATTLE GROWERS', ET AL.'S OPPOSITION TO SUMMARY JUDGMENT

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Table of Contents

Page

Table of Authorities ii

Introduction 1

Background 2

A. Legal background 2

B. Factual background 2

Standard of Review 3

Argument 4

I. "Knowingly" Should Be Interpreted Broadly To Avoid Criminalizing Seemingly Innocent Conduct 5

A. Take is defined so broadly that it would criminalize seemingly innocent conduct if knowledge of every element of the offense were not required 7

B. Knowledge of the species taken is necessary to avoid criminalizing seemingly innocent conduct because of the long list of obscure listed species 10

II. The Case on Which Wildearth Guardians Relies Is Irreconcilable with Supreme Court Precedent 11

III. Wildearth Guardians' Policy Concerns Are Addressed Through the Statute's Other Provisions 15

Conclusion 16

Certificate of Service 18

Table of Authorities

Page

Cases

Abramski v. United States, 134 S. Ct. 2259 (2014) 4

Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995) 2, 7-9

Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005) 13

Boise Cascade Corp. v. EPA, 942 F.2d 1427 (9th Cir. 1991) 16

Bryan v. United States, 524 U.S. 184 (1998) 5

Carter v. United States, 530 U.S. 255 (2000) 4-6, 8, 11, 13, 15

Dixon v. United States, 548 U.S. 1 (2006) 4-6, 11-12

Elonis v. United States, 135 S. Ct. 2001 (2015) 4-5, 8, 11, 13-15

GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) 7, 10

Illinois Commercial Fishing Ass'n v. Salazar, 867 F. Supp. 2d 108 (D.D.C. 2012) 15

Lambert v. California, 355 U.S. 225 (1957) 6, 11

Liparota v. United States, 471 U.S. 419 (1985) 7

McKittrick v. United States, 525 U.S. 1072 (1999) 3

Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) 12-13

Morissette v. United States, 342 U.S. 246 (1952) 5

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) 1, 4

Peck v. Thomas, 697 F.3d 767 (9th Cir. 2012) 3-4

Staples v. United States, 511 U.S. 600 (1994) 1, 5-6, 14

Torres v. Lynch, 136 S. Ct. 1619 (2016) 1

United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996) 6

United States v. Balint, 258 U.S. 250 (1922) 5

United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987) 12

United States v. McKittrick, 142 F.3d 1170 (9th Cir. 1998) 2-3, 11-12

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Page

United States v. Nguyen, 916 F.2d 1016 (5th Cir. 1990) 12
United States v. St. Onge, 676 F. Supp. 1044 (D. Mont. 1988) 12
United States v. U.S. Gypsum Co., 438 U.S. 422 (1978) 6, 15-16
United States v. X-Citement Video, 513 U.S. 64 (1994) 5, 7, 10
Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169 (9th Cir. 2009) 14

Statutes

5 U.S.C. § 706(2)(A) 3
16 U.S.C. § 1532(19) 2, 8
§ 1533 2
§ 1533(e) 10, 15
§ 1538(a)(1) 2, 16
§ 1538(a)(1)(B) 1, 6
§ 1540 16
§ 1540(b) 6
§ 1540(b)(1) 2, 16
§ 1540(g) 2, 15
18 U.S.C. § 3571(b)(5) 2

Regulations

50 C.F.R. § 11.33(c) 2
§ 17.11(h) 10
§ 17.31 2
§ 17.40(g) 8

Miscellaneous

4 Blackstone, *Commentaries on the Laws of England* (1769) 11
62 Fed. Reg. 6729 (Feb. 13, 1997) 8
82 Fed. Reg. 6307 (Jan. 19, 2017) 2

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1
Page

2 Baker, Jr., Dr. John S. & Haun, William J., *The "Mens Rea" Component Within the Issue of the Over-Federalization of Crime*,
3 14 Engage: J. Federalist Soc'y Prac. Groups 24 (2013) 11

4 Transcript of Oral Argument, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, No. 94-859, 1995 WL 243452 (U.S. Apr. 17, 1995) . . . 9, 15-16
5
U.S. Fish & Wildlife Serv., ECOS: Environmental Conservation Online System,
6 http://ecos.fws.gov/ecp (last visited Mar. 20, 2017) 10

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Introduction

The Endangered Species Act makes it a federal crime, punishable by a hundred thousand dollar fine and imprisonment, to "knowingly" take a listed species. 16 U.S.C. § 1538(a)(1)(B). The Department of Justice interprets this to require federal prosecutors to prove defendants knew their actions would cause take and the species that would be taken. For good reason—a contrary interpretation would criminalize ordinary, seemingly innocent conduct contrary to Supreme Court precedent. *See, e.g.*, *Torres v. Lynch*, 136 S. Ct. 1619, 1631 (2016) (describing the "'background rule' that the defendant must know each fact making his conduct illegal" (quoting *Staples v. United States*, 511 U.S. 600, 619 (1994)).

The rationale behind the government's interpretation—that Supreme Court precedent requires "knowingly" to apply to every element of the offense—is not only reasonable but legally required. Subsequent Supreme Court decisions have repeatedly confirmed the rule on which that interpretation is based, solidifying it as the only legally permissible interpretation.

Because the Department of Justice's interpretation is compelled by controlling Supreme Court precedent, both of Plaintiffs' (WildEarth Guardians) claims fail. The interpretation is not an abdication of federal prosecutors' obligation to enforce the statute but a faithful implementation of it. And, since the interpretation is not discretionary, the Department of Justice did not need to consult with the Fish and Wildlife Service before memorializing it. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007).[1]

///

///

///

[1] Consistent with the case management plan, Defendant-Intervenors New Mexico Cattle Growers' Association, et al. (Cattle Growers), will not repeat arguments made by the Department of Justice. Cattle Growers' and the Department's arguments on the merits slightly differ. Whereas the Department defends its interpretation as a reasonable one, consistent with prosecutorial discretion, Cattle Growers argues that it is not only reasonable but the only legally tenable interpretation under Supreme Court precedent.

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Background

A. Legal background

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 requirements for its protection. *See* 16 U.S.C. § 1533. This case concerns the prohibition against take of species, which the statute mandates for all endangered species and a regulation extends to threatened species. *See* 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.31. "Take" is defined to include "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). As this definition makes clear, it is a capacious term that includes a host of ordinary activities, if they result in some sort of harm to a member of a listed species or its habitat. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 701-02 (1995) ("take" includes land use activities that adversely modify habitat and harm species).

The take prohibition is enforced in a variety of ways. At issue here is a provision that makes it a crime to "knowingly" violate the take prohibition, punishable by up to $100,000 in fines and a year in prison. 16 U.S.C. § 1540(b)(1); *see* 18 U.S.C. § 3571(b)(5) (increasing the maximum fine to $100,000). Other violations—those not done "knowingly"—are punishable by a $1,270 fine on a strict liability basis. 16 U.S.C. § 1540(a)(1); *see* 50 C.F.R. § 11.33(c); 82 Fed. Reg. 6307, 6308 (Jan. 19, 2017) (increasing the fine to $1,270). The take prohibition is also enforced by citizen suits, through which any interested person—including environmental groups like WildEarth Guardians—can seek injunctive relief against the person who would cause the take. 16 U.S.C. § 1540(g).

B. Factual background

In 1998, the Ninth Circuit decided *United States v. McKittrick*, an appeal from a conviction under the take prohibition. *See* 142 F.3d 1170 (9th Cir. 1998). The defendant shot a gray wolf, which is a species listed under the Endangered Species Act, but claimed that he thought he was shooting a wild dog. Administrative Record (AR) 122. At the government's request, and over McKittrick's objection, the district court instructed the jury

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 that the government need not prove he knew the identity of the species or that it was listed
2 under the Endangered Species Act. Rather, it only had to prove that he'd knowingly fired
3 the shot, which resulted in the take of a listed species. *Id.* at 122-23. On appeal, McKittrick
4 argued that this instruction was inadequate because it eliminated the statute's knowledge
5 requirement, but the Ninth Circuit affirmed the conviction. *See* 142 F.3d at 1176-77.

6 McKittrick petitioned the Supreme Court for certiorari, again arguing that the
7 instruction was deficient because it eliminated the statute's *mens rea* requirement.
8 AR 17-21, 129. To avoid review, the United States disclaimed the Ninth Circuit's decision,
9 conceding that "it does not adequately explicate the meaning of the term 'knowingly[,]'"
10 and stating that the government would no longer support that jury instruction. *See* AR 129-
11 31; Pls.' Ex. 1 (ECF No. 88-1) at 2, Ex. 2 (ECF No. 88-2) at 49. Its brief acknowledged that
12 the Ninth Circuit's holding was irreconcilable with Supreme Court precedent and, therefore,
13 could not be defended. AR 129-31. After the United States made this representation, the
14 Supreme Court denied the petition. 525 U.S. 1072 (1999).

15 Following through on its representation to the Court, the Department of Justice
16 issued a memorandum to federal prosecutors directing them to no longer request and object
17 to the jury instruction at issue in *McKittrick*. AR 148-50. The memo reiterated that the
18 McKittrick instruction was contrary to Supreme Court precedent. *Id.* By all appearances,
19 the Department of Justice has kept its word to the Supreme Court. Now, federal prosecutors
20 must request jury instructions that put the burden on them to prove that the defendant knew
21 her actions would cause take and the identity of the species that would be taken. *See id.* at
22 151-55.

23 **Standard of Review**

24 As the Department of Justice explained more fully in its brief, the merits of
25 WildEarth Guardians' claims are reviewed under the Administrative Procedure Act. DOJ
26 Br. at 7. Under this standard, agency actions can only be overturned if, based on the
27 administrative record, the action is "arbitrary, capricious, an abuse of discretion, or
28 otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Peck v. Thomas*, 697 F.3d

767, 772 (9th Cir. 2012). Since this case concerns a criminal statute, the Court should not defer to the government's interpretation but decide questions of law de novo and resolve ambiguities in favor of potential criminal defendants. *See Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014) (the government receives no deference to its interpretation of the criminal law).

Argument

WildEarth Guardians challenges the Department of Justice's McKittrick Memorandum[2] as an abdication of its statutory responsibilities and because it was adopted without first consulting with the U.S. Fish and Wildlife Service. If the Endangered Species Act requires prosecutors to prove knowledge of all the elements of the offense, both claims fail as a matter of law. If so, the McKittrick Memorandum is not an abdication but a faithful interpretation of the statute and there is no obligation to consult because the interpretation is not discretionary. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 661-62.

The McKittrick Memorandum's interpretation is compelled by Supreme Court precedent, and WildEarth Guardians' claims fail. Since the Ninth Circuit decided *McKittrick*, the Supreme Court has unambiguously held that criminal statutes forbidding "knowing" violations require proof of every element of the offense, except in a narrowly limited circumstance not present here. *See, e.g.*, *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015) (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)); *Dixon v. United States*, 548 U.S. 1, 5 (2006). The Endangered Species Act's broad take prohibition is a prime example of why the Supreme Court has adopted that rule. Without it, people could be imprisoned for ordinary, seemingly innocent conduct without any *mens rea* protection.

[2] Although WildEarth Guardians challenges the McKittrick Memorandum, much of its brief reflects a misunderstanding of that memorandum or suggests that WildEarth Guardians' complaint should be directed elsewhere. On its face, the McKittrick Memorandum is limited to the jury instruction that must be used to secure a conviction for take. AR at 148-50. Yet WildEarth Guardians' brief asserts that the federal government does not adequately investigate or prosecute close cases. It's not clear that these allegations have been proven. *See* DOJ Br. at 34-39. But even if they were, they are no grounds to invalidate the McKittrick Memorandum's interpretation of the proper jury instruction. Simply put, it erects no legal obstacle to federal officials investigating or bringing charges in close cases.

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

I

"Knowingly" Should Be Interpreted Broadly To Avoid Criminalizing Seemingly Innocent Conduct

A bedrock principle of criminal law is that defendants must be "'blameworthy in mind'" before they can be found guilty. *Elonis*, 135 S. Ct. at 2009 (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)).

Therefore, 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)). A defendant does not need to know that his conduct is illegal; "[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,' [] even if he does not know that those facts give rise to a crime." *Elonis*, 135 S. Ct. at 2009 (quoting *Staples*, 511 U.S. at 608 n.3).

Just as the Supreme Court applies this rule when Congress omits an explicit *mens rea* element, it also reads express *mens rea* elements broadly to apply to every element of the offense. *See Elonis*, 135 S. Ct. at 2009-10. This rule is intuitive; if *mens rea* requirements are read into statutory silence, it makes little sense to read them out when Congress specifically puts them in. Relevant here, "the term 'knowingly' . . . requires proof of knowledge of the facts that constitute the offense." *Dixon*, 548 U.S. at 5 (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)).

At a minimum, 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*, 530 U.S. at 269 and *X-Citement Video*, 513 U.S. at 72). This consistently upheld rule is necessary to accommodate Due Process concerns and the rule of lenity. *See*

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

United States v. U.S. Gypsum Co., 438 U.S. 422, 440-42 (1978) (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. 225, 229-30 (1957) (criminally punishing activity which an ordinary person would have no reason to think is illegal violates the Due Process Clause). Without it, nothing would "shield people against punishment for apparently innocent activity." *See Staples*, 511 U.S. at 622 (Ginsburg, J., concurring).

The elements of the offense at issue here are that a defendant's actions will cause take and the identity of the species that will be taken. 16 U.S.C. § 1538(a)(1)(B). Absent the take of a listed species, the underlying actions would be legal and innocent. Thus knowledge of these facts is required. *See Dixon*, 548 U.S. at 5.

Since the knowledge requirement and the elements of the take offense are in separate provisions, there is no grammatical reason to apply that requirement to only one element or the other. *See* 16 U.S.C. § 1540(b) (making it a crime to "knowingly" violate a provision of the statute); 16 U.S.C. § 1538(a)(1)(B) (forbidding take). Therefore, either knowledge that both (1) an activity will result in take and (2) the identity of the species that will be taken is required or neither is. *See United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996) ("To [limit 'knowingly' to only certain elements of a violation] would require an explanation as to why some elements should be treated differently from others . . . ."). Although WildEarth Guardians' brief is not clear on this point, the force of its argument would mean that a person could be convicted solely for knowing that they are committing some act, if it coincidentally results in take of a listed species.

However, a general intent to have engaged in some act is not sufficient if it "would run the risk of punishing seemingly innocent conduct[.]" *Carter*, 530 U.S. at 269. That forecloses WildEarth Guardians' argument. The take prohibition is so broad that, if knowledge that one's actions will cause take is not required, it would criminalize an incomprehensible amount of activity that people engage in every day. Similarly, hundreds of obscure species are listed under the statute. Thus, if knowledge of the identity of the

species is not required, this too would threaten criminal punishment for activities that no reasonable person would expect.

A. Take is defined so broadly that it would criminalize seemingly innocent conduct if knowledge of every element of the offense were not required

Although WildEarth Guardians myopically focuses on hunting, this Court should not lose sight of the breadth of the criminal prohibition it is interpreting. The interpretation of "knowingly" must account for the wide variety of ways that the take prohibition could be violated. Supreme Court precedent demonstrates that this interpretive question should be resolved in light of any innocuous acts that could run afoul of the prohibition. *See, e.g.*, *X-Citement Video*, 513 U.S. at 69-70 (refusing to limit "knowingly" to only certain elements of an offense barring distribution of child pornography because it could apply to a druggist who develops a roll of film, an apartment tenant who receives mail intended for a former tenant, or the FedEx courier who delivers it). In several cases, the Court has looked beyond the unsympathetic facts of a case to recognize the broader consequences of interpreting *mens rea* protections narrowly. *See, e.g.*, *id.*; *Liparota v. United States*, 471 U.S. 419, 427 (1985) (describing how someone could innocently violate a prohibition on unauthorized use of food stamps if knowledge that the use was unauthorized were not required). This Court should do the same.

Take is not limited to hunting. Nor is it limited to intentionally causing an animal harm—the ordinary meaning of the term. *See Sweet Home*, 515 U.S. at 701-02; *id*. at 718-21 (Scalia, J., dissenting). Instead, it applies to any activity that causes, even inadvertently, some harm to a member of a species or its habitat. *Id.* at 701-02. This includes a wide variety of activities that people engage in every day.

A person causes take, for instance, if she builds a home on her private property unaware that an obscure insect lives below the surface. *See GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (upholding the application of the take prohibition to prohibit private property development in an area inhabited by subterranean spiders). She also causes take if, while driving down a rural highway late at night, she accidently hits a

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 protected animal that darts in front of her car. *See* 16 U.S.C. § 1532(19) (defining take to
2 include harming a listed species). So too does a mom who moves an animal that has been
3 run over in the street in front of her house before her kids see it. *See id*. (defining take to
4 include collecting a listed species); *see also* AR 148-50 (explaining that someone who
5 mistakenly shoots a wolf thinking it is a coyote can be prosecuted if, after discovering its
6 true identity, he picks it up or moves it).
7 A person who accidentally gets too close to a protected species also causes take. *See*
8 16 U.S.C. § 1532(19) (defining take to include harassing or attempting to harass a listed
9 species). The buffers around some of these species can be very large indeed; getting within
10 five football fields of a right whale while surfing or operating a boat is considered take. *See*
11 62 Fed. Reg. 6729 (Feb. 13, 1997).
12 The list of ordinary, seemingly innocent activities that can cause take does not end
13 there. Trimming or cutting down a tree can be take if the tree is used by a protected species
14 for some biological function. *See Sweet Home*, 515 U.S. at 701-02. Fishing can be take, if
15 you catch the wrong fish. *See* 16 U.S.C. § 1532(19) (defining take to include harming or
16 collecting a listed species). Farming can, too, if a plow disturbs a protected insect, rodent,
17 or any other animal. *Cf.* 50 C.F.R. § 17.40(g) (exempting normal farming practices from
18 take for a single listed species). Jogging can result in take, if you have the misfortune to
19 step on a protected insect crossing your path. *See* 16 U.S.C. § 1532(19) (defining take to
20 include harming or killing a listed species).
21 Suffice it to say that there is a nearly endless list of seemingly innocent activities
22 people do every day that could result in take. Under WildEarth Guardians' interpretation,
23 anyone who has the misfortune of harming a listed species while engaged in these activities
24 would be a criminal. That radical expansion of criminal liability to ordinary, seemingly
25 innocent activity cannot be squared with Supreme Court precedent. *See Elonis*, 135 S. Ct.
26 at 2010; *Carter*, 530 U.S. at 269. Recognizing this, the United States has long asserted the
27 interpretation the Department of Justice and intervenors defend in this case.
28 ///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 In the seminal Supreme Court case upholding the broad interpretation given to the
2 take prohibition, the United States responded to the justices' concerns about the impacts of
3 such a broad interpretation by relying on "knowingly" to shield innocent people from
4 criminal punishment. *See* Transcript of Oral Argument, *Babbitt v. Sweet Home Chapter of*
5 *Communities for a Great Oregon*, No. 94-859, 1995 WL 243452 (U.S. Apr. 17, 1995).
6 Three years before the Ninth Circuit decided *McKittrick*, the Solicitor General represented
7 to the Supreme Court that the United States' interpretation is exactly what it is today—that
8 federal prosecutors must prove knowledge that take would result and the identity of the
9 species that would be taken. *See id.* at *5-6 ("[W]hat the person has to know is that his
10 conduct will have the effect on the wildlife, but what—the only thing he doesn't have to
11 know is that the species is listed, and that was what Congress was driving at by changing
12 the mens rea requirement from wilful to knowingly."); *id.* at *6 ("[W]ould [you] have to
13 know, for example—if you drained a pond on your property, you'd have to know that there
14 is a particular frog or whatever— MR. KNEEDLER: Right.").
15 This interpretation persuaded the Court, which upheld the broad interpretation of
16 take. *Sweet Home*, 515 U.S. at 701-02. Both the majority and the dissent referenced the
17 government's interpretation of "knowingly" in their opinions. *See id.* at 701-02 (criticizing
18 the D.C. Circuit's narrow interpretation of "take" because "it ignored § 11's express
19 provision that a 'knowing' action is enough"); *id.* at 722 (Scalia, J. dissenting) ("The hunter
20 who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated
21 [the take prohibition] . . . because he does not know what sort of animal he is shooting.").
22 WildEarth Guardians attempts to have its cake and eat it too. It seeks to force the
23 Department of Justice to abandon this long-standing interpretation of "knowingly," while
24 keeping the broad definition of "take" upheld in *Sweet Home*. Under the Supreme Court's
25 clear rule that *mens rea* protections should be interpreted broadly to ensure that seemingly
26 innocent acts could not be criminal, WildEarth Guardians' desired result is untenable. Its
27 interpretation could make someone a criminal for innocuous activities, like driving, jogging,
28 or building a home, without any blameworthy state of mind.

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1
2
B. Knowledge of the species taken is necessary to avoid criminalizing seemingly innocent conduct because of the long list of obscure listed species

3 The take prohibition applies to a long list of obscure species that most people would 4 have no hope of identifying. The list of species regularly changes, but there are 5 approximately 1,500 species protected by the take prohibition today. *See* U.S. Fish & 6 Wildlife Serv., ECOS: Environmental Conservation Online System, http://ecos.fws.gov/ecp 7 (last visited Mar. 20, 2017). This list includes dozens of insects, spiders, rodents, and small 8 birds. *See id.*

9 All but the most popular and charismatic of listed species are unknown to most 10 people. While most may recognize the polar bear and manatee, few are likely to know the 11 Delhi sands flower-loving fly, the bone cave harvestman (a cave-dwelling spider), the 12 flat-spired three-toothed snail, or the dusky gopher frog. *See* 50 C.F.R. § 17.11(h) (list of 13 all endangered and threatened wildlife). The Endangered Species Act implicitly recognizes 14 that even enforcement officials cannot reasonably be expected to know how to identify 15 every listed species. *See* 16 U.S.C. § 1533(e) (authorizing the listing of look-alike species 16 where enforcement officials would have difficulty distinguishing them from endangered 17 species).

18 If, as WildEarth Guardians argues, all that is required is that the defendant 19 knowingly engaged in some act—or even that the defendant knowingly engaged in an act 20 that could cause the take of something—the defendant would be in the same position as the 21 druggist, apartment tenant, and FedEx courier that concerned the Supreme Court in 22 *X-Citement Video*. *See* 513 U.S. at 69. Engaging in an act, even one that one knows is likely 23 to harm some creature, is no more blameworthy than processing a roll of film or accepting 24 or delivering a package. *See id*.

25 Anyone who builds a home on their private property surely knows that developing 26 the land will make it less useful to birds who might otherwise have used it as a stopping 27 point and will harm insects, rodents, and other animals living in the soil. *Cf. GDF Realty*, 28 326 F.3d 622. Nonetheless homes are built every day without being considered morally

blameworthy. Similarly, anyone who has ever hand-washed a car knows that driving harms insects unfortunate enough to be in the same place at the same time as the moving vehicle. Nevertheless, driving is commonplace and seemingly innocent. Even hunting is perfectly lawful when pursuing legitimate prey. *See* Dr. John S. Baker Jr. & William J. Haun, *The "Mens Rea" Component Within the Issue of the Over-Federalization of Crime*, 14 Engage: J. Federalist Soc'y Prac. Groups 24, 26 (2013).

The only way to avoid criminalizing this ordinary, seemingly innocent activity, as Supreme Court precedent requires, is to follow the rule that the statute's "knowingly" requirement applies to every element of the offense. *See Elonis*, 135 S. Ct. at 2010; *Dixon*, 548 U.S. at 5; *Carter*, 530 U.S. at 269. Although much of the briefing in this case is devoted to prosecutorial discretion, the Court should keep in mind that this discretion cannot be relied upon to avoid this problem. *See Lambert*, 355 U.S. at 229-30. The statute must be interpreted to ensure that prosecutors do not have discretion to criminally punish seemingly innocent conduct. *See id.* Although eroding the statute's *mens rea* protections may make prosecutors' jobs easier, the law continues to respect Blackstone's principle that "it is better that ten guilty persons escape, than that one innocent suffer." 4 Blackstone, *Commentaries on the Laws of England* 352 (1769). This principle is given effect by the Supreme Court's insistence that *mens rea* requirements be interpreted broadly to ensure that ordinary, seemingly innocent acts cannot be criminally punished. *See Elonis*, 135 S. Ct. at 2010; *Carter*, 530 U.S. at 269.

II

The Case on Which Wildearth Guardians Relies Is Irreconcilable with Supreme Court Precedent

Despite the rule that *mens rea* protections must be broadly interpreted to apply to every element of the offense, the Ninth Circuit adopted a contrary interpretation of the provision at issue here in *McKittrick*. 142 F.3d at 1176-77. WildEarth Guardians hangs its

///

///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 case on this precedent.[3] To be binding, however, that decision must be reconcilable with
2 subsequent Supreme Court precedent. *See Miller v. Gammie*, 335 F.3d 889, 893, 899-900
3 (9th Cir. 2003) (*en banc*). It isn't.

4 It is difficult to imagine the Ninth Circuit reaching the same result today that it
5 reached in *McKittrick*, considering the government's longstanding, contrary interpretation
6 and the Supreme Court precedent discussed above. *McKittrick* is plainly irreconcilable with
7 settled law. It holds that "knowingly" in the Endangered Species Act's criminal provision
8 only requires that a defendant knowingly engaged in some act that caused take: knowledge
9 of the species that would be taken is not required. *See McKittrick*, 142 F.3d at 1176-77. As
10 explained, this interpretation would criminalize a wide swath of ordinary, seemingly
11 innocent conduct and cannot be reconciled with Supreme Court precedent. The Ninth
12 Circuit's opinion does not refer to any of the contrary Supreme Court precedent or offer any
13 justification why knowledge of every element of the offense is not required. Nor does it
14 address the problem of the wide range of seemingly innocent conduct its interpretation
15 would criminalize.

16 The only argument the Ninth Circuit's opinion offers to justify the result reached is
17 that Congress changed the *mens rea* requirement from "willfully" to "knowingly," making
18 take a general intent rather than a specific intent crime. *See id*. But as the Department of
19 Justice explains in its brief, this is a red herring, as its interpretation is entirely consistent
20 with take being a general intent crime. *See* DOJ Br. at 23. The difference between the two
21 types of crimes is whether the defendant's conscious purpose was to cause the forbidden
22 effect (specific intent) or not (general intent). *See Dixon*, 548 U.S. at 5-6 (distinguishing
23

24 [3] As WildEarth Guardians' brief implicitly shows, few courts have interpreted this provision. In addition to *McKittrick*, WildEarth Guardians cites decisions from the Fifth
25 Circuit and two district courts. *See United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990); *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988); *United States v. Billie*,
26 667 F. Supp. 1485, 1492 (S.D. Fla. 1987). As the Department of Justice has pointed out, the Fifth Circuit opinion says nothing about the question at issue here, focusing instead on
27 whether knowledge that a species is listed is required. *See* DOJ Br. at 27. Additionally, none of these cases are binding on this Court and, since they contravene the rule laid down
28 by the Supreme Court as WildEarth Guardians interprets them, they are not persuasive.

"knowingly" and "willfully"). A person who incidentally causes take while engaged in an action that he knows will cause the take of a particular species has committed a general intent crime, but not a specific intent one. Because it allows convictions in these circumstances, the McKittrick Memorandum is entirely consistent with take being a general intent crime. *See* DOJ Br. at 23.

WildEarth Guardians offers no argument to reconcile the Ninth Circuit's reasoning in *McKittrick* with Supreme Court precedent. Instead, it attempts to get around the unavoidable conflict by offering several potential distinctions which, in its view, would allow a Court to reach the same result today. *See* Pl. Mem. for Summ. J. at 20-25. None of these distinctions appear in *McKittrick.*

This is not how the Ninth Circuit requires courts to determine whether circuit precedent irreconcilably conflicts with Supreme Court precedent. As the Ninth Circuit held in *Miller*, Supreme Court precedent is controlling even where the issues are not identical and the circuit precedent is more on point, so long as "the reasoning or theory of [the] prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority." 335 F.3d at 893, 899-900.

Therefore, the critical question is whether the actual reasoning of the circuit decision conflicts with Supreme Court precedent, not whether some unidentified distinction might allow the court to reach the same result. *See id.* If the decisions conflict, "district courts 'should consider themselves bound by the intervening higher authority and reject the prior opinion of . . . [the Ninth Circuit] as having been effectively overruled.'" *Barapind v. Enomoto*, 400 F.3d 744, 751 n.8 (9th Cir. 2005) (quoting *Miller*, 335 F.3d at 900). The Ninth Circuit's rationale in *McKittrick* irreconcilably conflicts with the rule that "knowingly" applies to every element of the offense and therefore this Court is bound by the intervening higher authority. *See Elonis*, 135 S. Ct. at 2010; *Carter*, 530 U.S. at 269.

///

///

///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Setting this problem to one side, WildEarth Guardians' proffered distinctions also fail as a matter of law. It offers two possible distinctions: (1) that take is "only" punishable by up to one year in prison; and (2) *Elonis* says there may be cases where knowingly engaging in an act would be enough. Neither of these can withstand scrutiny.

First, Supreme Court precedent does not support the notion that *mens rea* protections can be read out of a statute so long as the punishment is only one year imprisonment. Instead, it has only cited the severity of punishment as an additional reason to broadly read these protections into a statute that is otherwise silent. *See Staples*, 511 U.S. at 619. Furthermore, WildEarth Guardians' argument would invite much mischief. Congress could break traditional crimes into several individual steps, each punishable as a misdemeanor, and thereby avoid the rule requiring *mens rea* protections to be broadly applicable. The McKittrick Memorandum explains why the broad take prohibition leads to a similar problem. A person who accidently harms a species, then moves it, has not violated the prohibition once but twice. *See* AR 148-50. In light of the wide variety of seemingly innocent activities implicated by this broad prohibition, the take prohibition is subject to the background rule requiring the *mens rea* protection to apply to every element of the offense.

Second, WildEarth Guardians' reliance on *Elonis*'s exception is misplaced. Although *Elonis* acknowledges an exception, it sets narrow limits on it. *See Elonis*, 135 S. Ct. at 2010. WildEarth Guardians offers no argument for why the take prohibition fits this narrow exception and any argument it might have made is therefore waived. *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 (9th Cir. 2009) (an argument not raised until the reply brief is waived).

Furthermore, the take prohibition does not fit within this narrow exception. As the Department of Justice has explained, the exception only applies where a statute omits *mens rea* protection. DOJ Br. at 24-25. It does not apply where, as here, Congress expressly limited criminal convictions to knowing violations. An additional reason the exception does not support WildEarth Guardians' position is that it only applies when knowingly engaging in an act is, on its own, sufficient "to separate wrongful conduct from 'otherwise innocent

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

conduct.'" *Elonis*, 135 S. Ct. at 2010 (quoting *Carter*, 530 U.S. at 269). As explained above, the broad definition of take and the long list of obscure species covered by it subjects a wide variety of otherwise innocent conduct to potential criminal punishment, unless knowledge of each element of the offense is required. WildEarth Guardians has made no attempt to show that its miserly interpretation of the knowledge requirement is sufficient to exclude otherwise innocent conduct from the prohibition. Therefore, this exception does not apply here.

III

Wildearth Guardians' Policy Concerns Are Addressed Through the Statute's Other Provisions

Although WildEarth Guardians' legal case lacks merit, its policy concerns are sympathetic. Fortunately, Congress provided many other means to address these concerns, without reading "knowingly" out of the statute. *See Gypsum*, 438 U.S. at 442 (citing the availability of alternative remedies in support of its refusal to erode *mens rea* protections).

The Endangered Species Act permits the listing of species that "so closely resemble" a listed species that it is difficult to distinguish them, if it would facilitate protection of the 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 provides clear criteria for the U.S. Fish and Wildlife Service to make that determination with and, if it proceeds with the listing, the Service can tailor the take prohibition's application to the look-alike species 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.

The statute also permits any interested person, including environmental groups like WildEarth Guardians, to seek an injunction against take even if not caused knowingly. 16 U.S.C. § 1540(g). If an injunction were sought against someone, regardless of whether it was obtained, any future claim of ignorance about the species would be dubious. *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,

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

it's going to kill the koala bear . . . and by that time he'd know it."). Congress' choice to require knowledge for criminal liability but not for injunctions shows that it intended to impose a higher standard for the former. *See* 16 U.S.C. § 1540. But WildEarth Guardians' interpretation conflates the two standards, reducing the difference in language to surplussage. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("[W]e must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous."); *see also Gypsum*, 438 U.S. at 442.

The statute also addresses WildEarth Guardians' policy concerns directly through its penalty provisions, which impose escalating punishments based on the seriousness of the violation. The most serious punishments ($100,000 in fines and imprisonment) are reserved for knowing violations under the provision at issue in this case. 16 U.S.C. § 1540(b)(1). Less serious violations—including take that is not caused "knowingly"—are punished by a $1,270 fine assessed on a strict liability basis. 16 U.S.C. § 1540(a)(1). This penalty can be assessed against anyone who inadvertently takes a listed species without knowing the identity of the species. *See id.* WildEarth Guardians' interpretation of "knowingly" would impermissibly render this provision redundant. *See Boise Cascade Corp.* 942 F.2d at 1432; *see also Gypsum*, 438 U.S. at 442.

Conclusion

Admirably, the Department of Justice has acquiesced to Supreme Court precedent limiting its power to stretch the criminal law. But no good deed goes unpunished. WildEarth Guardians challenges that legally compelled interpretation on policy grounds and as inconsistent with a two-decade old Ninth Circuit decision. As explained, that decision is clearly irreconcilable with Supreme Court precedent. Thus, this Court must follow the controlling Supreme Court precedent, not the eclipsed Ninth Circuit decision. As the United States has interpreted the statute for more than two decades, a person "knowingly" takes

///

///

an endangered species only if he engages in an act knowing that it will cause take and the species that will be taken.

DATED: March 23, 2017.

Respectfully submitted,

JAMES S. BURLING
M. REED HOPPER
JONATHAN WOOD

By s/ Jonathan Wood
JONATHAN WOOD

Attorneys for Defendant-Intervenors

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Certificate of Service

I hereby certify that on March 23, 2017, I electronically transmitted the attached document to the Clerk's Offices using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Judith Bella Calman
judy@nmwild.org

Steven Charles Sugarman
stevensugarman@hotmail.com

Kevin William McArdle
kevin.mcardle@usdoj.gov

Anna Margo Seidman
aseidman@safariclub.org

/s/ Jonathan Wood
JONATHAN WOOD