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Brief for the Appellant, Blackacre Forest Products, Inc.: Tenth Annual Pace National Environmental Moot Court Competition

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,
and
BLACKACRE FOREST PRODUCTS, INC.,
Appellants,
v.
CITIZENS TO SAVE THE BIRDS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT

FOR THE DISTRICT OF NEW UNION
Brief for the Appellant,
BLACKACRE FOREST PRODUCTS, INC.,

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QUESTIONS PRESENTED

- I. WHETHER CITIZENS TO SAVE THE BIRDS HAS
STANDING TO SUE, AND WHETHER THIS MAT-
TER IS RIPE FOR DECISION, CONSIDERING
BLACKACRE FOREST PRODUCTS HAS NOT YET
CAUSED THE DEATH OF ANY MIGRATORY BIRD
IN THE BIG TREE TRACT.
- II. WHETHER THE MIGRATORY BIRD TREATY ACT IS
“LAW” WITH WHICH AGENCY ACTIONS UNDER
THE NATIONAL FOREST MANAGEMENT ACT

MUST BE IN ACCORD FOR PURPOSES OF JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURES ACT.

III. WHETHER SECTION 703(a) OF THE MIGRATORY BIRD TREATY ACT SHOULD TO BE TREATED AS A STRICT LIABILITY CRIMINAL PROVISION.

IV. WHETHER THE MIGRATORY BIRD TREATY ACT PROHIBITS CAUSING THE DEATH OF MIGRATORY BIRDS BY HARVESTING TIMBER DURING THE NESTING SEASON.

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STATEMENT OF THE CASE

A. Preliminary Statement

This is an appeal from an order entered by Judge R. N. Remus in the United States District Court for the District of New Union denying Appellants' motion to dismiss the action brought against them by Citizens to Save the Birds, Inc. (CSB) for judicial review of the grant of logging rights by the United States Forest Service to Blackacre Forest Products,

Inc. (Blackacre). (R. at 1.) The District Court held that CSB's pleadings were legally sufficient to give rise to standing as a matter of law. (R. at 4.) Furthermore, the District Court held that the matters of statutory interpretation presented in this case offered a genuine issue of material fact sufficient, as a matter of law, to cause Appellants' Motion to Dismiss to be denied. (R. at 1.) Appellants challenge the findings of the District Court on both the standing issue and the various statutory interpretations made by the court. (R. at 3-6.)

B. Standard of Review

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion")." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The District Court's decision below was based upon statutory interpretation and consideration of case law. Its holding was based upon questions of law and the standard of appellate review, therefore, is *de novo*.

C. Statement of Facts

In May of 1997, the United States Forest Service (the Forest Service) authorized a timber sale to Blackacre pursuant to the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1687, permitting Blackacre to harvest timber on 500 acres known as the "Big Tree Tract" in the New Union National Forest. (R. at 1.) The Big Tree Tract is part of an area of old growth forest in the State of New Union which has the potential to serve as a valuable timber resource for the people of New Union. (R. at 1.) This sale was made in accord with the Forest Service's natural resource management plan (the Plan) developed under NFMA § 1604 and 36 C.F.R. pt. 219. (R. at 1.) The Plan designated some parts of the old growth forest, including Big Tree Tract, for timber harvesting and other parts for preservation. (R. at 1.) In conjunction with the Forest Service's development of the Plan and the ac-

tual timber sale itself, the Forest Service followed its normal administrative procedures including the preparation of an Environmental Impact Statement (EIS) as required under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370. (R. at 1-2.)

Citizens to Save the Birds, Inc. (CSB) is a not-for-profit corporation organized under the laws of the State of New Union. (R. at 2.) CSB alleges its members' ability to observe birds in the New Union National Forest in general, and the Big Tree Tract in particular, would be adversely affected if Blackacre were allowed to conduct timber harvesting activities in the Big Tree Tract. (R. at 2.) Specifically, CSB alleges Blackacre's timber harvesting activities could cause the deaths of migratory birds in violation of the Migratory Bird Treaty Act (MBTA). (R. at 2-3.) CSB seeks judicial review of the Forest Service's actions in making the sale under the NFMA, using the standard for judicial review set forth in the Administrative Procedure Act (APA), 5 U.S.C. § 706. (R. at 2.)

Blackacre and the United States have shown bird deaths may occur as a result of logging only if Blackacre actually harvests timber in the Big Tree Tract during nesting season. (R. at 3.) Neither the United States nor Blackacre have caused the death of any migratory bird by harvesting timber or in any other manner. (R. at 3.) Timber harvesting activities have not taken place in the Big Tree Tract, nor is there any evidence of Blackacre's intentions to ever log the Tract. (R. at 3.) Furthermore, there is no proof of Blackacre's intent to ever harvests timber in the Tract during the nesting season. (R. at 3.)

SUMMARY OF THE ARGUMENT

The decision of the United States District Court for the District of New Union denying Blackacre's Motion to Dismiss should be reversed because the District Court's decision rested on the following legal errors.

First, the District Court erroneously concluded CSB suffered a "concrete and particularized" injury and therefore had

standing to sue. The Supreme Court has held CSB must have a "concrete and particularized" injury before a matter is ripe for adjudication and before standing may be conferred upon a plaintiff. Since no migratory bird has been killed in the Big Tree Tract, CSB's injury is merely hypothetical. Therefore, the matter is not ripe for adjudication, nor does CSB have standing to sue.

Second, the District Court erred in allowing judicial review under the APA. The APA authorizes judicial review only when no alternative remedies are available. In CSB's case, judicial review of the Forest Service's actions is available under the NFMA's regulatory framework. Therefore, the District Court's grant of APA review was improper.

Third, the District Court erred in applying the MBTA as a strict liability criminal statute. Congressional intent indicates the MBTA was not intended to be applied as a strict liability criminal statute. Furthermore, the application of the MBTA as a strict liability criminal statute violates the Due Process Clause by denying liberty to innocent violators of the MBTA without due process of law.

Finally, the District Court erroneously concluded the MBTA applies to ordinary land uses such as timber harvesting. The plain language and the legislative history of the MBTA indicate the statute applies solely to hunters and poachers.

For the above mentioned reasons, Blackacre respectfully requests this Court's reversal of the District Court's decision below.

ARGUMENT

- I. CITIZENS TO SAVE THE BIRDS DOES NOT HAVE STANDING TO SUE, NOR IS THIS MATTER RIPE FOR ADJUDICATION, SINCE BLACKACRE FOREST PRODUCTS HAS NOT YET CAUSED THE DEATH OF ANY MIGRATORY BIRD IN THE BIG TREE TRACT.

- A. Absent a "Concrete and Particularized Injury," CSB Does Not Have Standing to Sue.

The notion of standing is designed to determine "whether [prospective plaintiffs] are the proper parties to bring . . . suit, thus focusing on the qualitative sufficiency of the injury and whether the complainant has personally suffered the harm." *Wilderness Soc'y v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996). "In order to satisfy the 'case or controversy' requirement of Article III [of the United States Constitution], which is the irreducible constitutional minimum of standing, a plaintiff must [among other things] demonstrate that he has suffered 'injury in fact'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); U.S. CONST. art. III, § 2. The *Defenders* Court has further defined an "injury in fact" to be an injury which is: "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560. "The party invoking federal jurisdiction bears the burden of establishing these elements." *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

CSB has failed to show a "concrete and particularized injury." The record indicates CSB's members allege they "would be adversely affected if Blackacre were allowed" to harvest timber in the Big Tree Tract. (R. at 2.) (emphasis added). The United States Supreme Court has held a "would be" injury is not a sufficient basis for granting standing, for it "takes us into the area of speculation and conjecture." *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). That is, "a threatened injury must be 'certainly impending' to constitute an injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

There is no evidence of a “certainly impending” injury in this case. In fact, quite the contrary is true. As Judge Remus noted in her decision, “there is no proof that Blackacre is about to log the Tract.” (R. at 3.) Thus, the alleged injury claimed by CSB cannot be deemed “certainly impending,” because intervening events could easily cause CSB to suffer no injury whatsoever and, thus, have no “case or controversy” to bring before this Court. Blackacre may decide to sell its holdings to a third party, relocate its operation, or go out of business, never setting foot in the Big Tree Tract or removing a single twig from its forest. With the potential for intervening events looming, this Court should not be lured into a situation in which its conferral of standing upon CSB would violate Article III of the Constitution by hearing a matter which does not qualify as a bona-fide “case or controversy.” As the Supreme Court noted in *Defenders*, the injury must “proceed with a high degree of immediacy in order to avoid deciding a case in which no injury will occur.” *Defenders*, 504 U.S. at 563 n.2.

Blackacre concedes it would be an entirely different situation if logging equipment were being transported to the Tract, or if the chain saws were whirring and the sawdust flying, for this action would clearly constitute an “impending injury” consistent with the Court’s holding in *Defenders*. However, absent such a showing of “impending injury” on the part of CSB, who is charged with the burden of producing such a showing, this Court must find CSB has not presented a “case or controversy” within the meaning of Article III of the Constitution. Since CSB has suffered no “concrete” or “certainly impending” injury, they cannot have standing to sue.

- B. This Court Should Follow the Lead of the Eighth and Eleventh Circuits Which Hold Direct Injurious Action Must Be Taken in Conjunction with a Forest Plan Before Article III Standing May Be Conferred upon a Plaintiff.

A split among five of the circuit courts has developed on the issue of whether environmental groups have Article III

standing to challenge forest management plans such as the one at issue in this case. The circuit courts finding environmental groups have standing to attack a forest management plan are the Sixth Circuit in *Sierra Club v. Thomas*, the Seventh Circuit in *Sierra Club v. Marita*, and the Ninth Circuit on a 2-1 decision in *Idaho Conservation League v. Mumma* and its progeny. *Sierra Club v. Thomas*, 105 F.3d 248 (6th Cir. 1997); *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995); *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992). The Eighth and Eleventh Circuits, however, have found environmental groups do not have standing to attack a forest management plan absent some further showing of a "concrete and particularized injury." *Alcock*, 83 F.3d at 386 (no ripe controversy); *Sierra Club v. Robertson*, 28 F.3d 753, 757-60 (8th Cir. 1994) (no Article III standing).

Both the Eighth and Eleventh Circuits had the opportunity to evaluate the logic contained in the *Marita* and *Mumma* decisions before ruling on the issue of standing. Both circuits rejected the *Marita* and *Mumma* logic on the ground that no "imminent" or "actual" injury had taken place as required by the Supreme Court's decision in *Defenders*. *Alcock*, 83 F.3d at 390; *Robertson*, 28 F.3d at 757-60. This Court should reject the *Marita* and *Mumma* holdings for the same reason: CSB has suffered no "imminent" or "actual" injury. The Eighth Circuit went so far as to say:

We have difficulty in discerning that a 'concrete and particularized' injury in fact was alleged in any of the [Ninth Circuit] cases. We therefore are not persuaded by these decisions, and we decline to apply them as a basis for finding that the appellants have standing to attack the Plan.

Robertson, 28 F.3d at 759. As the district court stated in *Alcock*: "[T]he Eighth Circuit's opinion in *Robertson* [is] more persuasive than that of the Ninth Circuit in *Mumma* and accordingly [we] will adopt the Eighth Circuit's decision finding a lack of standing in a case such as the instant one." *Wilderness Soc'y v. Alcock*, 867 F. Supp. 1026, 1041 (N.D. Ga. 1994). Not only is the *Robertson* opinion summarized above more persuasive, but it is also more consonant with the Supreme

Court's holding in *Defenders* which requires a "concrete and particularized injury." Absent further showing by CSB that it has suffered a "concrete and particularized injury," this Court must find the rationale adopted by the Eighth and Eleventh Circuits is proper in light of the *Defenders* decision and the "case or controversy" requirements of Article III of the United States Constitution. In sum, because CSB lacks an "imminent, concrete, and particularized injury," it also lacks standing to sue. This Court should dismiss CSB's claim without reaching the merits.

C. This Matter Is Not Ripe for Adjudication

The notion of ripeness requires a court to ask "whether this is the correct time for the complainant to bring the action." See Erwin Chemerinsky, *Federal Jurisdiction*, § 2.4.1 (1989). In the instant case, the timing of the suit as well as the propriety of appellants as plaintiffs causes justiciability problems.

The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and requires the decision of the agency to "be felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Requiring a matter to be ripe for adjudication "preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that 'the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" *Defenders*, 504 U.S. at 581 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

In this case, the effects of the forest management plan, and the timber sale itself for that matter, have yet to be felt by CSB. As the record indicates: "Blackacre has killed no migratory birds, and there is no proof that Blackacre will kill

birds in the future.” (R. at 3.) The record clearly shows no “concrete effects” have been felt by CSB, therefore, this Court should not become entangled in a situation in which no injury may ever occur. Indeed, this matter is unripe for decision for the same reasons CSB lacks standing.

Furthermore, “The value of not deciding an issue is affected by. . . the need to conserve judicial resources, and the risk that premature decision may be proved unwise.” *Wilderness Soc’y*, 867 F. Supp. at 1043. Our country is entering an era in which the first generation of forest plans authorized under the NFMA are coming up for review and revision as required by federal regulation. 16 U.S.C. § 1604(f)(5) (1996). Blackacre’s review of various government documents found 81 revised forest plans which are scheduled to be released in the next five years. If past is prologue, many (if not most) of these revised forest plans will be challenged in court by one or more environmental groups. This Court’s adoption of the Eighth and Eleventh Circuit Courts’ standing and ripeness rationale is not only consistent with the Constitution and the Supreme Court’s holding in *Defenders*, but it also would prevent a flood of needless litigation from washing over the federal courts. Because CSB’s claim is not ripe for adjudication, this Court should dismiss CSB’s claim without reaching the merits.

II. BECAUSE NFMA REVIEW IS AVAILABLE TO CSB, APA REVIEW IS IMPROPER.

A. Because the NFMA Provides an Adequate Remedy for CSB, APA Review Is Unavailable.

The APA authorizes judicial review only if there is “no other adequate remedy in a court.” 5 U.S.C. § 704 (1996). In CSB’s case, an alternative remedy is available in the NFMA’s regulatory framework for preserving fish and wildlife resources. 36 C.F.R. pt. 219.19 (1996). This section of the NFMA provides:

[W]ildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning pur-

poses, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure [sic] its continued existence is well distributed in the planning area.

While the above NFMA regulation causes CSB to lose stake to its claim of APA review, the reasonable result achieved under NFMA review is desirable for all parties involved. The benefit to CSB is its objective of "protecting the avian population resident in and migrating through the State of New Union" is furthered by the NFMA's requirement of a viable population within the forest planning area. (R. at 2.) The benefit to Blackacre and the Forest Service is a Solomon-like compromise is achieved whereby reasonable timber production may take place contemporaneously with reasonable migratory bird protection. The NFMA regulatory standard, by focusing on biological health at a population level, simply avoids the absurd results associated with the MBTA standard previously proffered by CSB; namely, prohibiting all economic activities resulting in the death of even one migratory bird. *See* Section III below.

If this Court chooses to adopt CSB's argument for a MBTA remedy under which they advocate a zero-tolerance threshold for bird deaths, such a decision would certainly create conflicts between the MBTA and the laws governing national forests. In addition, one of the main functions of the national forest management system would be undermined: timber production. Employing CSB's MBTA remedy would alter the congressionally-declared mandate that national forests be managed for multiple uses, and would substitute a philosophy whereby absolute protection of migratory birds supersedes any use which is even slightly dissonant with such a scheme.

Moreover, the NFMA remedy which allows for a reasonable number of incidental bird deaths and protects viable populations is superior to CSB's claim to a MBTA remedy because it is biologically impossible to manage a national forest preserving each bird or maximizing already viable populations of each migratory bird species. Some migratory bird

species compete more successfully in old-growth habitats. Different migratory bird species do better in younger-growth habitats created after timber harvesting and the replanting required by the NFMA. See 16 U.S.C. § 1604(g)(3)(e)(ii) (1996). The biological reality is any forest management choice, including a Forest Service decision not to sell any timber rights for logging, inevitably benefits some species and harms other species:

The Forest Service is charged with managing the ever-changing resources of the national forests. In the absence of forest management, trees would grow older, the character of plant and animal diversity would change, and some wildlife species would decline in numbers. Harvesting trees using even-aged management techniques necessarily results in younger stands. Wildlife dependent on younger stands would flourish at the expense of species dependent on older growth forests . . . These forest dynamics make clear that protecting forest resources involves making trade-offs.

Sierra Club v. Espy, 38 F.3d 792, 802 (5th Cir. 1994).

Requiring an environmental plaintiff to seek the proper remedy under the appropriate substantive Act is not a new concept. For example, in *Defenders v. EPA*, the Eighth Circuit held since "EPA acted under FIFRA, judicial review should be obtained under the FIFRA framework." *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1302 (8th Cir. 1988). Similarly, this Court should hold since the Forest Service made the timber sale to Blackacre under the NFMA framework, judicial review should also be had in the context of the NFMA framework.

In sum, judicial review of actions taken in conjunction with a forest plan which affect migratory birds occurs under the "viable population" framework of the NFMA. This framework provides an adequate remedy which precludes a direct MBTA claim. The appropriate way of achieving review of the Forest Service's actions is to challenge those actions under statutes pursuant to which the Forest Service already has an affirmative duty to act, such as the NFMA.

- B. In the Alternative, If APA Review is Applied, this Review Reveals the Forest Service's Timber Sale to Blackacre was "In Accordance with the Law."

The APA provides in pertinent part: "[A] reviewing court shall— . . . (2) hold unlawful and set aside agency action . . . found to be . . . not in accordance with the law." 5 U.S.C. § 706(2)(A) (1996). CSB claims the Forest Service's timber sale to Blackacre under the NFMA is "not in accordance with the law" since this sale might eventually result in migratory bird deaths in violation of the MBTA. (R. at 2.) In this case, in order for the Forest Service's actions to be "not in accordance with the law," CSB must show: (1) the MBTA has been violated by the United States Forest Service and, (2) the MBTA applies to the United States Forest Service. *Preferred Risk Mutual Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996). CSB cannot satisfy either of these two prongs.

1. The MBTA has not been violated by the United States Forest Service, therefore, the Forest Service's timber sale to Blackacre was "in accordance with the law."

As Judge Remus noted in her decision below, "[T]he Forest Service has killed no migratory birds, [and] the Forest Service will kill no migratory birds." (R. at 3.) In addition, the MBTA is not a strict liability offense as discussed below in section III. Therefore, the Forest Service could not have violated any of the MBTA's provisions. Absent a violation of the MBTA by the Forest Service, its actions are by definition "in accordance with the law." If the Forest Service's actions are "in accordance with the law," then APA judicial review, if applied, must find that the Forest Service's timber sale to Blackacre was proper.

2. The MBTA does not apply to the United States Forest Service, therefore, APA review of the Forest Service's timber sale to Blackacre is "in accordance with the law."

The plain language of the MBTA indicates the Act was not meant to apply to federal actions. The MBTA's prohibition against "taking" any migratory bird applies only to "any person, association, partnership, or corporation." 16 U.S.C. § 707(a) (1996). Noticeably absent from this list of covered violators are the terms "sovereign" or "federal agency." Furthermore, the term "person" has consistently been held not to include the federal government, its agents, or officers. *Preferred Risk*, 86 F.3d at 792; *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). In sharp contrast, the Endangered Species Act, designed to apply to federal actions, defines the term "person" as "an individual, corporation, partnership . . . [and] any officer, employee, agent, department of the Federal Government . . . or any other entity subject to the jurisdiction of the United States." 16 U.S.C. § 1532(13) (1996).

Clearly, the plain language of the MBTA indicates the United States is not covered by the Act. The resulting chain of logic, then becomes child's play. If the Forest Service is not covered by the MBTA, then the Forest Service cannot be in violation of the Act. If the Forest Service is not in violation of the Act, then by definition, the Forest Service's actions are "in accordance with the law." Ultimately, if the MBTA does not apply to the Forest Service, then its actions are "in accordance with the law" as defined by the MBTA. Because APA review reveals the Forest Service's timber sale to Blackacre was "in accordance with the law," then this Court should dismiss this action without reaching the merits of CSB's MBTA claim.

III. SECTION 703(a) OF THE MIGRATORY BIRD TREATY ACT SHOULD NOT BE TREATED AS A STRICT LIABILITY CRIMINAL PROVISION.

A. The Absence of a Mens Rea Requirement in § 707(a) of the MBTA Violates the Due Process Clause of the United States Constitution.

The basic premise that *mens rea* is required to establish criminal liability is supported by the Latin maxim "*actus non facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty)." W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.4, at 212 (1986). It is a deeply-rooted notion in American law that crime requires the concurrence of an evil-meaning mind with an evil-doing hand. *Dennis v. United States*, 341 U.S. 494, 500 (1951). "The existence of a *mens rea* is a rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.*

The *mens rea* requirement originates in the Due Process Clause, found in the Fifth and Fourteenth Amendments of the United States Constitution, which prevents any person from being deprived of "life, liberty, or property without due process of law." U.S. CONST. amend. V; amend. XIV, § 1. When a law has the potential to "deprive an individual of liberty," as in this case, courts generally require proof of *mens rea* as a component of due process protection. *Dennis*, 341 U.S. at 501. Section 707(a) of the MBTA allows for individuals to be deprived of both liberty and property in that "any person, association, partnership, or corporation who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$500 or be imprisoned not more than six months, or both." 16 U.S.C. § 707(a) (1996). For the following reasons, the misdemeanor penalty provision of the MBTA violates the due process guarantees afforded by the United States Constitution.

1. Because violations of the MBTA are not “public welfare offenses,” *mens rea* is required under the Due Process Clause of the United States Constitution.

Strict liability offenses are “generally disfavored” by the United States Supreme Court when criminal penalties may be imposed. *Liparota v. United States*, 471 U.S. 419, 426 (1985). However, the Supreme Court has held strict liability criminal offenses are proper when the proscribed conduct is a “public welfare offense.” See, e.g., *United States v. Freed*, 401 U.S. 601 (1971); *United States v. Feola*, 420 U.S. 671 (1975). Blackacre asserts that an incidental violation of the MBTA is not a public welfare offense, therefore, *mens rea* must be required in order to satisfy the due process guarantees afforded by the United States Constitution.

Legitimate public welfare offenses have been defined by the Supreme Court as offenses in which the offender engages in a “type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health and safety.” *Liparota*, 471 U.S. at 433. The Court has further defined public welfare offenses as offenses which “create the danger or probability of [immediate injury to person or property] which the law seeks to minimize.” *Morissette v. United States*, 342 U.S. 246, 256 (1952). Public welfare offenses have included the sale of impure or adulterated foods or drugs, driving faster than the speed limit, the sale of intoxicating liquor to minors, improper handling of dangerous chemicals or nuclear wastes, and the possession of certain illegal weapons. See, e.g., *United States v. Park*, 421 U.S. 658 (1975) (sale of contaminated food); *United States v. Dotterweich*, 320 U.S. 277 (1943) (sale of mislabeled drugs); *United States v. Int’l Minerals & Chemical Corp.*, 402 U.S. 558 (1971) (transportation of dangerous liquids or products); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984) (dumping of hazardous wastes); *United States v. Freed*, 401 U.S. 601 (1971) (possession of illegal hand grenades).

The obvious rationale for these strict liability public welfare offenses is to protect the public from grave and imminent harm. *Freed*, 401 U.S. at 609. Clearly, each of the aforementioned examples of legitimate public welfare offenses pose a grave danger to our society. Blackacre has no quarrel with legitimate strict liability public welfare regulations when the clearly demonstrated objective is to protect society from grave and imminent danger. The important purpose of protecting society from grave and imminent danger is certainly furthered by their existence, and they have been consistently upheld under constitutional review on these grounds. See, e.g., *United States v. Balint*, 258 U.S. 250 (1922).

However, violations of the MBTA do not rise to the level of "dangerousness" found in traditional public welfare offenses. While incidental violations of the MBTA may result in some aesthetic diminishment of our environment, violations of the aforementioned examples of traditional public welfare regulations result in dramatically increased highway deaths, a poisoned food supply, and spilled nuclear waste. See generally, Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401 (1993) (discussing the requirement of dangerousness in public welfare offenses). The huge disparity in the societal impact of violations of the MBTA versus violations of drug labeling laws or laws governing the handling of nuclear waste speaks volumes about the MBTA's classification as a regulation outside the purview of traditional public welfare regulations. See generally, Dennis Jenkins, *Criminal Prosecution and the Migratory Bird Treaty Act: An Analysis of the Constitution and Criminal Intent in an Environmental Context*, 24 B.C. Envtl. Aff. L. Rev. 595 (1997) (discussing activities which do not threaten the greater public with imminent harm as being inappropriately classified as public welfare offenses).

Applying this logic of comparative dangerousness, the *Liparota* Court refused to lump together the potentially innocent violator of food stamp regulations with the criminally dangerous possessor of hand grenades. *Liparota*, 471 U.S. at 426. This Court should follow the *Liparota* Court's lead in recognizing the unacceptable due process implications of

grouping non-public welfare regulations together with legitimate public welfare regulations. Because causing the death of a migratory bird poses no grave danger to the public, the MBTA cannot be deemed a public welfare regulation. Individuals who inadvertently violate the MBTA's provisions should not be held to the same standard as individuals who threaten our society with grave and imminent harm. While due process rights may legitimately be relegated to the back seat in order to protect society from grave danger, the notion of Americans sacrificing their constitutional rights to save a bird's egg or its abandoned nest should be rejected by this Court.

2. The harsh penalties imposed under § 707(a) of the MBTA require a *mens rea* component in order to satisfy the due process guarantees afforded under the United States Constitution.

Strict liability criminal convictions violate the Due Process Clause when the attached penalties are "relatively large" or "gravely besmirch" the defendant's reputation. *See, e.g., Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960); *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985). The vast body of jurisprudence on this issue sets forth neither a clear line of demarcation between "relatively large penalties" and "relatively small penalties," nor between penalties which "gravely besmirch" and penalties which "do not gravely besmirch" an individual's reputation. *Morissette*, 342 U.S. at 260. However, the penalties which may be imposed for misdemeanor violations of the MBTA clearly qualify as "relatively large" and "gravely besmirching."

With respect to the threshold at which a criminal penalty becomes "relatively large," it has been stated:

[I]f the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind. To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this funda-

mental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent.

Morissette, 342 U.S. at 260 (quoting 2 POLLOK & MAITLAND, HISTORY OF ENGLISH LAW, 465). By attaching a prison sentence of up to six months to a violation of the MBTA, § 707(a) clearly meets the *Morissette* test set forth above for a “relatively large penalty.” Moreover, there is especially convincing evidence in the legislative history of the MBTA that the penalties in § 707(a) were intended to be interpreted as extremely harsh penalties. For example, Congressman Graham stated:

[T]his section provides a penalty of \$500 or an imprisonment of not more than six months for a violation of any of the provisions of this act, or any of the regulations that may be issued from time to time by the Department of Agriculture. You will observe that *it is a rather severe penalty for the infraction of any game law.*

56 CONG. REC. 7452 (June 6, 1918) (statement of Rep. Graham) (emphasis added). Furthermore, Congressman Johnson added: “[Individuals] should not be subjected to a penalty *as extreme as* \$500 or an imprisonment for six months, or both.” 56 CONG. REC. 7457 (June 6, 1918) (statement of Rep. Johnson of Washington) (emphasis added). Congressman Dempsey also pointed out the severity of the penalties of § 707(a) by noting: “[E]very innocent boy who goes out to play upon the streets and breaks a bird’s egg through accident is to be haled 500 miles away and punished as if he were committing an offense of the highest degree, and with all the rigors of the criminal law.” 56 CONG. REC. 7456 (June 6, 1918) (statement of Rep. Dempsey). Clearly, Congress interpreted the misdemeanor penalties of § 707(a) the MBTA as “relatively large penalties.”

This language aside, the judiciary has failed to succinctly demarcate the point at which penalties become “relatively large.” Through constructive analysis, however, the line between “relatively large” and “relatively small” becomes dis-

cernible. In *Wulff*, the felony provisions of the MBTA were deemed to be violative of the Due Process Clause because the felony provisions of the MBTA "were not, in the court's mind, a relatively small penalty." *Wulff*, 758 F.2d at 1125 (quoting *United States v. St. Pierre*, 578 F. Supp. 1424, 1429 (D.S.D. 1983)). A mere three years later, in *United States v. Engler*, the Third Circuit Court of Appeals concluded: "the differences between the objective penalties of the misdemeanor and felony provisions of the Act is [sic], for due process purposes, *de minimis*." *United States v. Engler*, 806 F.2d 425, 434 (3d Cir. 1986).

The resulting logic in comporting *Wulff* and *Engler* may be reduced to the simplicity of a logical proof. If we are given in *Wulff* that the felony provision of the MBTA is violative of due process, and if it is further given in *Engler* that the penalties of the felony and misdemeanor provisions of the MBTA are substantially the same, then the obvious conclusion is that the misdemeanor provision of the MBTA, like its substantially similar felony counterpart, is also violative of due process. While this analysis wins the portion of the battle which deems the penalties under § 707(a) to be "relatively large" in nature, we now turn to the question of whether these penalties "gravely besmirch" one's reputation.

In 1986, the United States Court of Appeals for the Third Circuit struggled with the question of when a penalty "gravely besmirches" an individual's reputation in the context of an MBTA prosecution. *Engler*, 806 F.2d at 434. In frustration, the *Engler* court stated: "We would . . . be more comfortable if empirical data from psychologists and sociologists were present in the record in this case to furnish guidance as to when the grave danger to an offender's reputation does or does not attach." *Id.*

This Court need not require cold empirical data in order to hold a \$500 fine and six months in a federal prison would "gravely besmirch" an individual's reputation. Certainly no member of the bar, nor bench for that matter, would claim a six-month stint in a federal prison would be easily wiped from the consciousness of her peers or her reputation as a member of the legal community. This terrible stain on an individual's

reputation is certainly an irreparable one. Indeed, even the prosecution in the *Engler* case conceded the absence of a *mens rea* requirement in the MBTA was violative of due process. *Id.* at 433.

For the foregoing reasons, this Court should hold the misdemeanor penalty provisions contained in § 707(a) of the MBTA are “relatively large penalties” which “gravely besmirch” an individual’s reputation. Furthermore, this Court should hold these penalties may not be imposed without *mens rea* under the Due Process Clause of the United States Constitution.

3. The government’s notion of “selective prosecution” of MBTA violations is an insufficient protection of Due Process rights under the United States Constitution.

The government has taken the position that Due Process rights will not be violated when the offender has innocently violated the MBTA, because federal prosecutors maintain “unfettered discretion” in determining whether to prosecute violations of the MBTA (R. at 3.) The government contends this notion of “prosecutorial discretion” will prevent companies like Blackacre from losing the protection afforded them under the Due Process Clause. However, Blackacre asserts the federal government should not be allowed to pretend it is the benevolent guardian of due process rights. Prosecutorial discretion is an unconstitutionally arbitrary exercise of governmental authority and should not be allowed by this Court. This Court should adopt reasoning similar to the court in *United States v. Kantor* who held: “[I]f law enforcement officials could always be trusted to do the right thing, there need never have been a Bill of Rights.” *United States v. Kantor*, 677 F. Supp. 1421, 1435 (C.D. Cal. 1987).

The United States Supreme Court has stated the Due Process Clause protects citizens from the arbitrary exercise of governmental power. *Minder v. Georgia*, 183 U.S. 559, 562 (1902). The notion of prosecutorial discretion, however, is by definition, an arbitrary exercise of governmental power. “While some prosecutor’s offices follow strict guidelines based

upon an objective criteria, others are guided by nothing more than the personal predilections of the attorney assigned to the case." Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, 15 Temp. Envtl. L. & Tech. J. 161 (Fall 1996). A Los Angeles County prosecutor for example, says the decision of whether to indict a company depends on how the violation affects his neck hairs. Leslie Spencer, *Designated Inmates*, FORBES, Oct. 26, 1992, at 100. He says: "When the little hairs on the back of your neck stand up, it's a felony. When it just makes you tingle, it's a misdemeanor. If it does nothing to you at all, it's a civil problem." *Id.* The situation is so obviously rotten, even many (perhaps more enlightened) prosecutors concede "there is simply too much uncertainty in environmental law." William P. Kucewicz, *Crime and Punishment*, ECO, June 1993, at 54 (quoting Massachusetts Attorney General Scott Harshbarger).

Furthermore, it is no secret many prosecutors harbor ambitions for higher office. Those individuals might allow public opinion and potential media coverage to affect their decision to prosecute a "big, bad logging company" in return for a few votes and some face time on the local news. In addition, detailed prosecution records are kept by many prosecutor's offices including the office's "batting average." Joseph F. Lawless, Jr., PROSECUTORIAL MISCONDUCT 26, § 1.29 (1985). Without question, the allure of a guaranteed conviction under a strict liability statute may cause prosecutors to attempt to improve their conviction rates by prosecuting an otherwise innocent individual under the MBTA.

Blackacre contends the wielding of such tremendous governmental power ought not be determined by this random and arbitrary methodology. It is the duty of this Court to hold prosecutorial discretion will not suffice as protection against due process violations when no *mens rea* exists. In Blackacre's situation, the government has stated it will decide whether to prosecute Blackacre for any incidental bird deaths which may arise only after timber harvesting operations commence. (R. at 4.) Meanwhile, Blackacre is at the mercy of a federal prosecutor's predilections, her political as-

pirations, and perhaps even her neck hairs. This Court must not allow such injustice to stand since Blackacre is entitled to "fair notice of what constitutes illegal conduct" so it may have "reasonable notice of what conduct is prohibited so that it may act accordingly." See, e.g., *United States v. Dahlstrom*, 713 F.2d 1423, 1427 (9th Cir. 1983); *Colten v. Kentucky*, 407 U.S. 104, 110 (1972); *Connally v. General Construction Co.*, 269 U.S. 385 (1926). "Private citizens who want to take . . . [ordinary] actions that might cause the death of a single migratory bird, like cutting down a tree or mowing a field, [should not be forced to] take their chances with the government's prosecutorial discretion." *Mahler v. United States Forest Service*, 927 F. Supp. 1559, 1579 (S.D. Ind. 1996). The United States Supreme Court has long held: "[N]o individual [may] be forced to speculate at his peril of indictment whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 104 (1926). Any statute which fails to give fair notice of prohibited conduct "violates the first essential of due process of law." *Connally*, 269 U.S. at 389 (1926).

B. Congressional Intent As to the Absence of a *Mens Rea* Requirement in § 707(a) of the MBTA is Sufficiently Vague and Ambiguous to Cause the Rule of Lenity to Be Applied.

Congress addressed the absence of a *mens rea* component in the misdemeanor provision of the MBTA by adding a *mens rea* requirement to the MBTA's felony provision in 1986 stating: "Nothing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. § 707(a), a standard which has been upheld in many Federal [sic] court decisions." S. Rep. No. 99-445, at 16 (1986) *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128. However, this statement is not remarkable for what it *does* say, rather, it is remarkable for what it *does not* say. This statement does not say: "We intend for the misdemeanor provision to be a strict liability provision." Instead, it essentially says: "The amendment to the felony provision is not intended to affect the status quo of federal prosecutions under the misdemeanor provision." Albeit a narrow distinction, this language

was clearly meant to give guidance to federal prosecutors who may have been uncertain as to how Congress's amendment to the felony provision could affect their current and future cases under the MBTA's misdemeanor provision. The statement of the 99th Congress sends a clear message to federal prosecutors, but it also sends a terribly unclear message to those attempting to determine whether Congress intended for the misdemeanor provision to have been a strict liability provision in the first place.

Furthermore, recent evidence exists supporting the proposition which suggests Congress never intended for the misdemeanor provision of the MBTA to be a strict liability provision. As recently as 1997, Senator Breaux testified before the House Subcommittee on Fisheries, Conservation, Wildlife, and Oceans: "A doctrine has developed *in the federal courts* by which the intent or knowledge of a person hunting migratory birds . . . is not an issue." *Migratory Bird Treaty Reform Act: Hearings on H.R. 741 Before the Subcomm. on Fisheries, Conservation, Wildlife, and Oceans*, 105th Cong. 1 (1997) (testimony of Sen. Breaux) (emphasis added). Senator Breaux's testimony implicates the federal courts, and presumably its prosecutors, as being responsible for developing the strict liability doctrine under § 707(a) of the MBTA, and not the 99th Congress or any of its statements in amending the MBTA. Because of interpretory ambiguity, this Court may also turn to the intent of the Congress which enacted the original provision to determine whether its intentions are clearly set forth.

Unfortunately, the 65th Congress was no more enlightening than the 99th Congress on the issue of whether the omission of *mens rea* was intentional. In fact, the court in *United States v. Wulff*, scrutinized the Congressional Record and determined the 65th Congress's omission of *mens rea* in the MBTA was "quite likely . . . due to oversight." *Wulff*, 758 F.2d at 1124 n.1. Indeed, throughout the entire congressional debate regarding the enactment of the MBTA in 1918, the issue of *mens rea* was mentioned only briefly as an aside

by just one Congressman.¹ While the members of the 65th Congress should be commended for their work during a difficult time in our Nation's history, the congressional record indicates the pressing matters of

World War I caused careful and deliberate consideration of the MBTA to take a back seat to the consideration of war measures.² It should come as no surprise Congress could overlook such one of the most important provisions of a criminal statute: its requisite mental state. It was this type of legislative oversight which prompted then-Judge Scalia to quote Otto von Bismarck, lamenting: "Reading [through the congressional record] transcript reminds one of an observation . . . those who love law and sausages should see neither of them being made." *Community Nutrition Inst. v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984).

Having established the 99th Congress was excessively vague as to its intent regarding the actual construction of the statute, and having also established the 65th Congress omitted *mens rea* due to oversight, the Court should then turn to the question of how to resolve this matter of statutory inter-

1. "What are you going to do in a case like this: A barefoot boy, as barefoot boys sometimes do, *largely through inadvertence and without meaning anything wrong*, happens to throw a stone . . . and strikes and injures a robin's nest and breaks one of the eggs . . ." 56 CONG. REC. 7455 (June 6, 1918) (statement of Rep. Mondell) (emphasis added). This reference to *mens rea* was made during banter with another Congressman during the debate. No serious discussion of *mens rea* took place throughout the entire MBTA debate.

2. "Mr. Chairman, we are spending valuable time that might be devoted to a more useful purpose. The U-boats are now barking and biting at our doors, and our boys are confronting the Hindenburg line in Europe and the great battle of the centuries is on; and yet we are spending [time] passing a measure protecting meadow larks and woodpeckers." 56 CONG. REC. 7446 (June 6, 1918) (statement of Rep. Tillman); "Now . . ., with the fact that it is a good thing to protect the birds of the country, why can not we in a most momentous time like this *legislate promptly and expeditiously*, and let the measure for the restitution and rehabilitation of the injured and maimed human life take its place before the House? [Applause]" 56 CONG. REC. 7456 (June 6, 1918) (statement of Rep. Dempsey) (emphasis added); "I had understood that the legislation of this session was to be confined to war measures and that nothing was to be done to interfere with the consummation of that kind of legislation. I [doubt] whether it is claimed that the prevention of the shooting of birds out of season is a war measure . . . We have a great deal of work to do." 55 CONG. REC. 4399 (June 28, 1917) (statement of Sen. Dempsey).

pretation absent any clear guidance from Congress. The Supreme Court has held when the proper application of a criminal statute is unclear, and congressional intent on the matter is also unclear, the court should apply the "rule of lenity." *United States v. United States Gypsum Co.*, 438 U.S. 422, 444-45 (1978). The rule of lenity provides that where there is ambiguity in the language of a criminal statute, ambiguity should be resolved in favor of the more lenient interpretation. BLACK'S LAW DICTIONARY 902 (6th ed. 1990). Therefore, proper application of the rule of lenity to the misdemeanor provision of the MBTA would require this Court hold, absent clear guidance from Congress to the contrary, *mens rea* should be a requisite component of § 707(a) of the MBTA for any conviction to be proper.

For the aforementioned reasons, this Court should interpret the misdemeanor provision of the MBTA as requiring *mens rea*. Specifically, this Court should follow the lead of the enlightened Fifth Circuit which, in the face of ambiguous congressional intent, requires a minimum level of *mens rea* as a necessary element under the misdemeanor provision of the MBTA, subsequently applying the more lenient "knew or should have known" standard. *See, e.g., United States v. Delahoussaye*, 573 F.2d 910, 913 (5th Cir. 1978); *United States v. Sylvester*, 848 F.2d 520, 522 (5th Cir. 1988).

C. Significant Public Policy Concerns Dictate the Requirement of a Mens Rea Component Under § 707(a) of the MBTA.

The United States Supreme Court has held: "In determining the scope of a statute, absurd results are to be avoided." *See, e.g., Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Comm'r v. Brown*, 380 U.S. 563, 571 (1965); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989); *United States v. Turkette*, 452 U.S. 576, 580 (1981). Additionally, the Court has stated:

[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and

yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). Clearly, the strict liability criminal prosecution of incidental violations of the MBTA has the potential to produce absurd results which Congress could not have intended. For example, one could imagine a situation in which a migratory bird is accidentally struck and killed on the highway by a member of Citizens to Save the Birds or another environmental protection group. Under the government and CSB's reasoning, this individual is subject to a strict liability criminal prosecution, and would be subject to penalties of up to a \$500 fine and six months in prison. This result is clearly classified as absurd and should not be allowed to stand by this Court.

"Certainly construction [of the MBTA] that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings, or picture windows in residential dwellings into which birds fly, would offend reason and common sense." *United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978). As the Fifth Circuit Court of Appeals held in *Catlett*, "[r]endering criminal conviction an unavoidable occasional consequence of [everyday activities] would serve to deny [these everyday activities] to those such as, say judges who might find such an occasional consequence unacceptable." *United States v. Catlett*, 747 F.2d 1102, 1105 (5th Cir. 1984). If this Court determines the misdemeanor provision of the MBTA is a strict liability criminal offense, not only would such a holding produce "absurd results" contrary to the intent of the United States Supreme Court, but it would also induce virtual paranoia in any person who cares about the effect such "occasional consequences" would have upon their reputation.

Keeping with the example of judges set forth in the *Catlett* case, such a judge would be loathe to drive a car for fear of hitting a bird covered by the Act, pilot an airplane for fear of

such a bird being caught in the propeller, or even have windows in his home for fear of a migratory bird striking the pane and being killed. Under the interpretation of § 707(a) proffered by the government and CSB, the individual in each of these examples would instantly be branded a federal criminal, be subjected to all of the penalties set forth therein, and would suffer the shame and humiliation of facing a federal prosecution for her “crime.”

These harsh results are not the product of fanciful conjecture. In fact, quite the contrary is true, for ruinous examples abound. Consider the example of Mr. Mark Cobb, whose situation was recently brought to the attention of the United States House of Representatives by Congressman Don Young, an advocate of the “known or should have known” standard for the misdemeanor provision of the MBTA. Mr. Cobb was taking part in a charity dove hunt when he was arrested, prosecuted, and convicted of violating the misdemeanor provision of the MBTA for “baiting” under the strict liability standard. Congressman Young’s testimony before the Subcommittee on Fisheries, Conservation, Wildlife, and Oceans regarding Mr. Cobb’s situation reads as follows:

It was also wrong for our government to ruin the military career of Mark Cobb, a University of Florida student who was fined by the Service in the Cross City [charity] Dove Hunt. Mark paid his \$250 fine, after erroneously being told this was a minor infraction — like a speeding ticket — and would not be part of his permanent record. Since then, Mark has lost his ROW scholarship and forever has a federal criminal record. For what it’s worth, Mark has stated that “I know what bait is illegal and saw none where I hunted.”

Migratory Bird Treaty Reform Act: Hearings on H.R. 741 Before the Subcomm. on Fisheries, Conservation, Wildlife, and Oceans, 105th Cong. 3 (1997) (testimony of Rep. Young). Clearly, this result is absurd at best, and is repugnant to the traditional notions of fairness and justice which are of paramount importance to our society and judicial system at worst.

Furthermore, given the prolixity of the list of covered birds and the enigmatic nature of the statute itself, a situation is created in which no reasonable person, let alone the simple Saturday morning hunter, can possibly be held responsible for each and every minutiae of the entire MBTA. A criminal statute must define the offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Indeed, the MBTA certainly qualifies as an environmental law which environmental lawyers cannot easily decipher.³ Such a sorry situation tugs at the very threads of the cloth of a free society. James Madison noted: "[I]t will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood . . ." *The Federalist* No. 62, at 287-88 (James Madison) (Hallowell, 1852).

In fact, no bird death even need occur for an individual to be prosecuted under the strict liability standard. For example, under § 705 of the MBTA which prevents disturbing the abandoned nests of migratory birds, the family who takes their Christmas tree home to their living room with part of an abandoned warbler's nest inside may be spending their holiday in a federal prison under the government and CSB's interpretation of § 707(a). Indeed, under the government and CSB's interpretation, the chairperson of the Migratory Bird Conservation Commission appointed under § 715(a) of the MBTA is subject to strict liability criminal prosecution if she files her annual report to Congress one day late in violation of

3. In a recent survey, 47 percent of 200 environmental attorneys interviewed said the environmental duty which occupied most of their time and energy was trying to determine the seemingly basic question of whether their clients were complying with the law. Marianne Lavelle, *Environmental Vise: Law, Compliance, In Companies Staff Up and Struggle to Stay Ahead of the Green Machine*, Nat'l L. J., Aug. 30, 1993, at 1. (The referenced survey was performed by Arthur Andersen Environmental Services and National Law Journal.) "Nearly 70 percent [of the attorneys surveyed] said they didn't believe total compliance with the law was ever achievable— due to the complexity of the law . . ." *Id.*

§ 715(b). That is, the chairperson would qualify as a person who, according to the government and CSB, “shall [have] violate[d] any provision . . . of this subchapter . . . or fail[ed] to have compl[ied] with this subchapter,” and be subject to strict liability criminal prosecution under § 707(a) of the MBTA. 16 U.S.C. § 707(a) (1996). Regarding the complexity of the MBTA, chances are, even the chairperson if asked, would concede she is unaware she is subject to strict liability federal prosecution for filing her report a day late, having never caused the death of a single migratory bird.

This Court should take a stand against such ridiculous results. “In its zeal to stamp out pollution, the federal government has assumed extraordinary police and prosecutorial powers over the citizenry. The growing threat to civil liberties is frightfully real.” Lynch, *supra* at 192. Furthermore, the government and CSB’s interpretation of § 707(a) of the MBTA makes a mockery of our judicial system by creating a situation in which total compliance is impossible, innocent citizens are jailed, and absurd results abound. Because of the aforementioned absurdities, public policy dictates this Court should follow the United States Supreme Court’s decisions in *Trans Alaska*, *X-Citement Video*, and *Bock Laundry* in which the Court held such absurd results cannot be allowed to stand. *Trans Alaska*, 436 U.S. at 643; *X-Citement Video, Inc.*, 513 U.S. at 66; *Bock Laundry*, 490 U.S. at 509.

IV. THE MIGRATORY BIRD TREATY ACT DOES NOT PROHIBIT MIGRATORY BIRD DEATHS CAUSED BY HARVESTING TIMBER DURING THE NESTING SEASON.

A. The Plain Language of the Statute Indicates the MBTA Should Not Be Applied to Timber Harvesting Activities.

1. The terms "take" and "kill" as contained in § 703 of the MBTA are not applicable to incidental deaths of migratory birds caused by timber harvesting activities.

The MBTA makes it "unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill . . . any migratory bird." 16 U.S.C. § 703 (1996). The term "take" is further defined as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12 (1996). These active words describe "physical conduct of the sort engaged in by hunters and poachers." *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991). Such active verbs do not pertain to any aspect of timber harvesting. "[T]he words 'take' and 'kill' were used in a context that clearly focused on hunting, trapping, and poaching." 46 Fed. Reg. 29,491 (June 2, 1981) (Department of the Interior legal opinion that, under its common meaning, "take" should "include only those actions that are directed against individual wildlife.")

As a result of the active words Congress chose to use in drafting the MBTA, the Ninth Circuit held the MBTA does not reach timber harvesting activities. *Evans*, 952 F.2d at 302-03. The *Evans* court held even the broadest MBTA reading "do[es] not suggest that habitat [modification], leading indirectly to bird deaths, amounts to the 'taking' of migratory birds with the meaning of the MBTA." *Id.* As the court noted in *Sierra Club v. Martin*, a "taking does not occur simply because of habitat . . . modification." *Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996).

This narrow interpretation was also adopted by the court in *Citizens Interested in Bull Run v. Edrington*. *Citizens In-*

terested in *Bull Run v. Edrington*, 781 F. Supp. 1502 (D. Or. 1991). In *Bull Run*, the court refused to “take the plaintiffs’ bait” of an expansive reading of the MBTA stating: “attempts to expand the definition of a ‘taking’ under the MBTA have been rejected by at least two other district courts.” See *Bull Run*, 781 F. Supp. at 1510; *Headwaters v. Lujan*, Civ. No. 87-1160-FR, 1991 WL 81838 (D. Or. May 8, 1991); *Seattle Audubon Soc’y v. Robertson*, No. C89-160-WD, 1991 WL 180099 (W.D. Wash. March 7, 1991). The *Bull Run* court properly determined, as this Court should, the MBTA “was intended to apply to individual hunters and poachers,” and not to loggers as CSB argues. *Bull Run v. Edrington*, 781 F. Supp. at 1506.

Furthermore, neither the MBTA nor its companion regulations include the term “harm” within the definition of “take.” However, “harm” does appear in the definition of “take” in the Endangered Species Act of 1973 (ESA). 16 U.S.C. § 1532(19) (1996). This is significant since the word “harm,” and that word only, has been defined expansively to include wildlife injuries which occur through habitat modification. Absent the word “harm,” the MBTA cannot be applied to habitat modification. The Supreme Court has stated:

The statutory context of ‘harm’ suggests that Congress meant [for ‘harm’] to serve a particular function in the ESA, consistent with but distinct from the functions of the other verbs used to define ‘take.’ The secretary’s interpretation of ‘harm’ to include indirectly injuring endangered animals through habitat modification permissibly interprets ‘harm’ to have ‘a character of its own not to be submersed by its association.’

Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 695 (1995) (quoting *Russell Motor Car Co., v. United States*, 261 U.S. 514, 519 (1923)).

In addition, “[T]he differences in the proscribed conduct under the ESA and MBTA are distinct and purposeful.” *Evans*, 952 F.2d at 302-03. It is important to note, after the ESA was enacted, Congress amended the MBTA in 1974 and 1989, but did not add the word “harm” to the MBTA. This further buttresses the argument indicating the absence of the

word "harm" in the MBTA is intentional and, therefore, the inapplicability of the MBTA to habitat modification is also intentional. As the court noted in *Sierra Club v. USDA*: "This is strong evidence that the MBTA does not include a prohibition of habitat modification or degradation." *Sierra Club v. USDA*, 116 F.3d 1482, 1997 WL 295308 (7th Cir. 1997).

2. The terms "by any means" and "in any manner" as contained in § 703 of the MBTA are not applicable to incidental deaths of migratory birds caused by timber harvesting activities.

When taken out of context, the terms "by any means" and "in any manner" appear to be convincing evidence indicating land uses which cause the incidental death of a migratory bird may be prohibited by the MBTA. However, as the United States Supreme Court has consistently held: "a statute should be read as a whole to interpret its plain meaning." See, e.g., *Beecham v. United States*, 511 U.S. 368, 371-72 (1994). To limit the analysis of the MBTA to these two isolated phrases is reminiscent of the strikingly appropriate caveat which warns against failing to see the forest for the trees. A statutory phrase (such as "by any means") which suggests a broad construction "is not an invitation to apply [the Act] to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). When interpreted as a whole, the MBTA clearly should not be applied to incidental bird deaths caused by timber harvesting activities.

In the 80 years since the enactment of the MBTA, there has not been a single recorded government prosecution alleging timber harvesting or other non-ultrahazardous land uses violate the MBTA's "by any means" language. Yet the District Court has chosen to enlarge the MBTA to include such activities absent any evidence of legislative authority to do so. Blackacre submits the correct interpretation of the MBTA is the one endorsed by the *Mahler* court which held:

The better reading of the statute is to find that the prohibitions apply only to activity that is intended to kill or cap-

ture birds or to traffic in their bodies and parts . . . [T]his court does not believe that an 80 year old statute is properly interpreted for the first time to effectively prohibit [timber harvesting] activity that has gone on apace during the entire time the statute has been on the books.

Mahler, 927 F. Supp. at 1583.

Furthermore, the MBTA provides for “special purpose” permits to be issued by the Forest Service before the otherwise illegal “taking” of migratory birds “by any means” may become proper. 16 U.S.C. § 712(2) (1996); Migratory Bird Permits, 50 C.F.R. §§ 13, 20, and 21 (1995). These permits are issued for purposes of taxidermy (§ 21.24), scientific study (§ 21.23), and banding (§ 21.22). *See* 50 C.F.R. § 21 (1995). Noticeably absent are regulations allowing permits for timber harvesting, farming, flying airplanes, and other activities not directed at wildlife. Because timber harvesting is not covered as an “activity for which a permit is required,” this suggests the MBTA only prohibits activities which are directed at wildlife, not deaths caused literally “by any means” as CSB argues. *Activity for Which a Permit is Required*, 50 C.F.R. § 13.1 (1995). Considering the aforementioned factors, this Court should hold incidental deaths caused by timber harvesting are not violative of the MBTA’s “by any means” language since these deaths are not directed at wildlife.

B. The Legislative History of the MBTA Indicates Congress Did Not Intend for the MBTA to Apply to Timber Harvesting Activities.

The 65th Congress was very clear about the intended reach and scope of the MBTA. The congressional record conclusively indicates the MBTA was not intended to apply to timber harvesting. As Senator Smith stated during floor debate, the MBTA is intended to do “[nothing] . . . except to keep pothunters from killing game out of season [and] ruining the eggs of nesting birds.” 55 CONG. REC. 4402 (June 28, 1917) (statement of Sen. Smith). Ample evidence exists supporting the proposition indicating hunters, not loggers, were the target of the MBTA for the “improvement of guns have [sic] been

such that [migratory birds] can be reached in all places, and they are slaughtered promiscuously." 56 CONG. REC. 7370 (June 4, 1918) (statement of Rep. Baker). Congressman Fess also confirmed the MBTA was aimed at the "market hunter," and not at the timber industry as CSB argues. 56 CONG. REC. 7357 (June 4, 1918) (statement of Rep. Fess).

Furthermore, much of the debate in Congress surrounded the issue of whether federal officials could conduct searches of farms and houses for birds which had been poached by hunters. *See, e.g.*, 56 CONG. REC. 7356-81 (June 4, 1918); 56 CONG. REC. 7472-76 (June 7, 1918). No legislator suggested the MBTA was meant to inhibit land uses such as timber harvesting which might incidentally cause the death of a migratory bird. In fact, quite the contrary is true. One of the main functions of the MBTA was to protect timber harvesting interests by allowing migratory birds to curb the number of timber-eating insects, thereby protecting valuable timber resources.⁴ In fact, the American Forestry Association heartily endorsed the passage of the MBTA, and was one of the driving forces in favor of its enactment stating in a resolution adopted by their membership:

[T]he American Forestry Association respectfully urges the present Congress to make effective, through the necessary legislative action, the recently ratified convention between the United States and Great Britain for the protection of useful migratory birds.

Speedy action is desirable in view of the increasing economic loss to all the people which must ensue if action be deferred until the next Congress.

56 CONG. REC. 7357 (June 28, 1918). If the MBTA was intended to impede timber harvesting activities as CSB argues, the American Forestry Association certainly would not have given the legislation such a ringing endorsement. Thus, as

4. "[Annual losses of] natural-forest products [attributable to insects], approximately estimated, [are] \$100 million." 56 CONG. REC. 7357 (June 4, 1918) (statement of Rep. Fess); "[T]he protection of the insectivorous migratory birds is essential to the preservation of our . . . timber crop." 56 CONG. REC. 7360-61 (June 4, 1918) (statement of Rep. Stedman).

the United States Supreme Court noted early in the history of the MBTA, the preservation of agriculture and valuable timber interests was the ultimate objective of the MBTA, not the restriction of timber harvesting activities as CSB urges. *Missouri v. Holland*, 252 U.S. 416, 431, 435 (1920). If Congress had intended for the MBTA to apply to incidental bird deaths caused during ordinary land uses such as timber harvesting, it would have expressed its intent as such. As the court stated in *United States v. Rollins*: "Such specificity would not have been difficult to draft into the statute." *United States v. Rollins*, 706 F. Supp. 742, 744-45 (D. Idaho 1989). This Court should follow the intent of Congress and hold the MBTA does not apply to timber harvesting activities.

1. If the MBTA was intended to reach land uses which incidentally cause the Death of migratory birds, then Congress need not have enacted the Migratory Bird Conservation Act of 1929 which was designed to reach such land uses.

Confirmation of the limited scope of the MBTA is found in the subsequently enacted Migratory Bird Conservation Act of 1929 (Conservation Act). 16 U.S.C. §§ 715-715(s) (1996). The Conservation Act was enacted to provide for federal land acquisition "where the acquisition of lands is approved by a commission and the State." 16 U.S.C. §§ 715-715(s) (1996).

As the Eighth Circuit Court of Appeals noted: "[T]he MBTA[s] stated purpose proscribes the hunting, capture, possession, and sale of migratory birds . . . The Conservation Act authorizes . . . the [acquisition of] land for . . . migratory bird sanctuaries." *United States v. North Dakota*, 650 F.2d 911, 913 (8th Cir. 1981). If the MBTA already precluded timber harvesting or other land use activities which would directly or indirectly cause migratory bird deaths as CSB argues, the subsequently enacted Conservation Act would have been unnecessary. Stated another way, there would be no reason for Congress to enact the Conservation Act authorizing the purchase of bird sanctuaries if the MBTA already proscribed the incidental deaths of migratory birds through ordinary land uses. Under CSB's reading of the MBTA, the

entire country is already a bird sanctuary. This court should reject CSB's logic and adopt the plain logic of the *North Dakota* court which serves as compelling evidence indicating the MBTA was not meant to interfere with ordinary land uses such as timber harvesting.

2. If the MBTA was meant to restrict timber harvesting activities, then Congress would have repealed the previously enacted National Forest System logging authorization.

The historical context of the MBTA's enactment further demonstrates it does not apply to timber harvesting activities. See *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (1997). Twenty years before the enactment of the MBTA, Congress passed the Organic Administration Act of 1897 which authorized logging in forests such as the New Union National Forest "for the purpose of furnishing a continuous supply of timber for the use and necessities of the citizens of the United States." 16 U.S.C. § 475 (1996). Blackacre does not dispute the Organic Administration Act's congressional mandate authorizing such timber harvesting incidentally causes the deaths of migratory birds. As the Eleventh Circuit Court of Appeals held in *Martin*: "It is difficult to imagine that Congress enacted the MBTA barely twenty years later intending to prohibit . . . [bird deaths caused by timber harvesting activities] given that the Forest Service's authorization of logging on federal lands inevitably results in the deaths of individual birds and the destruction of nests." *Martin*, 110 F.3d at 1555. Congress's long-standing authorization of timber harvesting activities in national forests indicates that the subsequently-enacted MBTA does not apply to previously authorized timber harvesting activities in national forests, including the New Union National Forest.

CONCLUSION

For the foregoing reasons, Appellant Blackacre respectfully requests this Court to reverse the District Court's decision granting CSB judicial review under the Administrative

Procedures Act and granting CSB standing under Article III of the Constitution. Appellant Blackacre also requests this Court reverse the District Court's holding that the MBTA is a strict liability criminal offense which applies to timber harvesting activities.