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2017]

UNITED STATES V. CITGO PETROLEUM CORP.:
THE FIFTH CIRCUIT "TAKES" OIL REFINERY OFF
THE HOOK FOR UNINTENTIONAL
MIGRATORY BIRD DEATHS

I. INTRODUCTION

In the United States, an estimated 365 million to 988 million birds die from colliding with windows annually.¹ Under the current circuit split in the United States Court of Appeals, window owners could face potential liability in jurisdictions, such as the Second Circuit and Tenth Circuit of the United States Court of Appeals, which have adopted a strict liability interpretation of bird "takings" under the Migratory Bird Treaty Act of 1918 (MBTA).² The implementation of strict liability for migratory bird deaths has divided federal courts and left industries and commentators wondering how far liability will extend in these jurisdictions.³ As a result, window owners may need to be wary of potential criminal prosecution.⁴

This Note addresses a challenge to the strict liability interpretation of the MBTA applied to migratory bird "takings."⁵ In *United States v. CITGO Petroleum Corporation*,⁶ oil giant CITGO challenged convictions under the Clean Air Act (CAA) for erroneous jury instructions regarding the "scope of a regulation concerning 'oil-water separators,'" in addition to convictions under the MBTA, because the district court incorrectly applied strict liability for "takings."⁷

In the CAA, the Environmental Protection Agency (EPA) included provisions to regulate wastewater treatment systems at oil

1. Susan Milius, *Windows may kill up to 988 million birds a year in the United States*, SCIENCE NEWS (Jan. 27, 2014, 5:01 PM), <https://www.sciencenews.org/article/windows-may-kill-988-million-birds-year-united-states> (quantifying bird deaths per year in United States).

2. See *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 494 (5th Cir. 2015) (listing violations under strict liability); see also *Current Circuit Splits*, 12 SETON HALL CIRCUIT REV. 250, 265–66 (2016) (explaining current split among federal courts interpreting MBTA).

3. See *Circuit Splits*, *supra* note 2, at 265 (explaining federal courts' split when interpreting MBTA).

4. See *CITGO Petroleum Corp.*, 801 F.3d at 494 (explaining potential for liability).

5. For a further discussion of the "takings" clause in this Note, see *infra* notes 5-7 and accompanying text.

6. 801 F.3d 477 (5th Cir. 2015).

7. *Id.* at 479 (stating defendant's primary challenges on appeal).

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refineries.⁸ In the original draft of Subpart QQQ of the CAA, the EPA proposed regulations that governed all equipment in the wastewater treatment system, including “‘equalization basins and other auxiliary tanks. . . .’”⁹ During the review process, industry commentators opposed this extensive regulation, citing “‘safety concerns’” that could not be addressed by the industry “‘in a cost effective manner.’”¹⁰ In response to industry feedback, the EPA made substantial changes to the final draft, including excluding equalization tanks from the regulation.¹¹ In *CITGO Petroleum Corp.*, the Fifth Circuit adopted this exclusion, promoting the express meaning of the regulation’s text to reverse the district court’s convictions, which relied on the application of the broader intention that the CAA’s original text contemplated.¹² CITGO also challenged the district court’s adoption of strict liability for violations of the MBTA.¹³ In reversing the district court’s convictions, the Fifth Circuit joined the Eighth Circuit and Ninth Circuit in holding that the MBTA adopted the common law definition of “takings,” which does not impose punishment for unintentional or negligent actions.¹⁴

This Note analyzes the Fifth Circuit’s decision in *CITGO Petroleum Corp.*¹⁵ Part II of this Note provides the factual and procedural background of the CAA and MBTA convictions that led to this appeal.¹⁶ Part III provides the statutory history and an overview of relevant case law for the CAA and MBTA.¹⁷ Part IV presents the analysis the Fifth Circuit undertook to determine that the CAA does not regulate equalization tanks and that the MBTA does not punish unintentional or negligent acts.¹⁸ Part V takes a critical look at how and why the Fifth Circuit reached its holding.¹⁹ Lastly, Part VI ana-

8. *Id.* (explaining EPA’s authority under CAA).

9. *See id.* at 487 (discussing CAA’s history).

10. *Id.* (quoting government’s explanation and changes).

11. *See CITGO Petroleum Corp.*, 801 F.3d at 486-87 (noting drafting changes of rule under CAA).

12. *See id.* at 487 (explaining Subpart QQQ’s exclusions).

13. *Id.* at 479 (stating defendant’s primary challenges).

14. *See id.* at 489 (stating agreement with Eighth Circuit’s and Ninth Circuit’s interpretation of “taking”).

15. For a further discussion of the court’s analysis and findings, see *infra* notes 98-173 and accompanying text.

16. For a further discussion of the factual background of *CITGO*, see *infra* notes 21-30 and accompanying text.

17. For a further discussion of the legal background of *CITGO*, see *infra* notes 31-97 and accompanying text.

18. For a further discussion of the Fifth Circuit’s narrative analysis, see *infra* notes 98-173 and accompanying text.

19. For a further discussion of the Fifth Circuit’s critical analysis, see *infra* notes 174-203 and accompanying text.

lyzes the impact of the Fifth Circuit's holding and the divide between circuits on this issue.²⁰

II. FACTS

In March 2002, Texas environmental inspectors subjected CITGO Petroleum Corporation and CITGO Refining and Chemicals Company, L.P. (CITGO) to a surprise inspection, and discovered 130,000 barrels of oil floating in uncovered equalization tanks at the Corpus Christi, Texas refinery.²¹ During the inspection, the inspectors uncovered the remains of more than three dozen migratory birds.²² As a result, the inspectors cited CITGO for violations of the CAA because such a significant quantity of oil in an equalization tank indicated that the tanks were functioning as oil-water separators.²³

Thereafter, in 2007, a Texas grand jury issued a ten-count indictment against CITGO, including five counts of unlawful "taking" of migratory birds in violation of the MBTA and two counts of violating the CAA by "knowingly operating [t]anks . . . as oil-water separators without proper emission control devices. . . ."²⁴ At a nonjury trial, the court found CITGO guilty on both counts of the

20. For a further discussion of the decision's impact, see *infra* notes 204-215 and accompanying text.

21. United States v. CITGO Petroleum Corp., 801 F.3d 477, 480 (5th Cir. 2015) (explaining initial inspection and CITGO's violations).

22. *Id.* at 480 n.4 (listing birds found in equalization tank). "Among the bird remains were five White Pelicans, twenty (regular old) Ducks, two Northern Shoveler Ducks, four Double Crested Cormorants, one Lesser Scaup Duck, one Black-Bellied Whistling Tree Duck, one Blue-Winged Teal Duck, and one Fulvous Whistling Tree Duck." *Id.*

23. *Id.* at 480 (describing citation issued to CITGO following March 2002 inspection). The Environmental Protection Agency (EPA) instituted The Clean Air Act as a response to health concerns related to oil refinery wastewater treatment systems. *Id.* at 479. The wastewater treatment system includes:

[A] series of drains located in different parts of the refinery [that] collect the wastewater as it is generated. From there, the water travels through lateral sewers into the first piece of equipment, aptly called an oil-water separator. When wastewater enters the separator, oils and solids with specific gravities less than that of water float to the top, which heavy sludge and solids sink to the bottom. Skimmers then remove the top layer of floating oil for recycling. . . . After wastewater passes through the oil-water separator it pools in large vessels called equalization tanks. . . . When oil accumulates in the tanks, skimmers and vacuum trucks extract the excess oil for recycling.

Id. at 479-80. Finally, the water goes through air flotation before undergoing biological treatment and passing through a clarifier prior to release. *Id.* at 480.

24. See *id.* (explaining procedural history of indictment). In addition to the seven counts listed in the accompanying text, CITGO's indictment included three additional violations of the Clean Air Act, for which a jury exonerated CITGO at trial. *Id.*

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CAA violations for the improper oil-water separators and on three of the five counts for “taking” migratory birds.²⁵ The convictions resulted in a two million dollar fine for violating the CAA and “[fifteen thousand dollar fines] for each MBTA offense.”²⁶ On appeal, the United States Court of Appeals for the Fifth Circuit reversed the district court’s convictions on all counts.²⁷ The court determined that the equalization tanks in question did not meet the definition of an “oil-water separator,” and the migratory birds’ deaths were not a “taking” because the court determined negligent and unintentional behavior was not included in the definition.²⁸ The Fifth Circuit is the fifth federal appeals court to weigh in on the interpretation of the word “taking” in the MBTA.²⁹ The decision joined the Eighth Circuit’s and Ninth Circuit’s rulings, which limited the scope of the statute to intentional acts, in contrast with the Second Circuit’s and Tenth Circuit’s ruling, which held in favor of strict liability for “takings,” regardless of whether the acts were deliberate.³⁰

III. BACKGROUND

Originally enacted on July 3, 1918, to codify treaties entered into by the United States, the Migratory Bird Treaty Act (Treaty) states, generally, that it is “unlawful . . . by any means . . . to pursue, hunt, take, capture, kill, attempt to take, . . . , or kill, . . . any migratory bird. . . .”³¹

25. *Id.* at 481 (stating district court’s verdict in two-part trial). Specifically, the proceedings included a jury trial, during which the jury found CITGO guilty of two of the five violations of the Clean Air Act, as well as a nonjury phase, during which the district court convicted CITGO on three of the five violations of the MBTA. *Id.*

26. *CITGO Petroleum Corp.*, 801 F.3d at 481 (listing CITGO’s punishments for five-count conviction).

27. *Id.* at 481 (holding harmful error required reversal of convictions).

28. *Id.* at 488-89 (explaining Fifth Circuit’s rationale on appeal).

29. For more information on the current split among federal courts on statutory interpretation of MBTA, see *supra* note 2 and accompanying text.

30. See *Circuit Splits*, *supra* note 2, at 265 (explaining current split among federal courts on statutory interpretation of MBTA).

31. 16 U.S.C. § 703 (2016) (explaining regulatory basis for enacting MBTA); see also James Lockhart, *Validity, Construction, and Application of Migratory Bird Treaty Act*, 16 U.S.C.A. §§ 703 to 712, and its Implementing Regulations, 3 A.L.R. FED.2D 465, 466 (2005) (annotating implementation of MBTA).

The full text of the MBTA reads:

(a) In general. Unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, *take*, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport

The adopted uniform system of protection for migratory birds operates as a strict liability offense and punishes violators with a maximum fine of fifteen thousand dollars and, potentially, six months imprisonment.³² The Treaty's codification also delegates discretion to the Secretary of the Interior to permit and govern certain activity under the statute.³³ The MBTA earned notoriety the United States Supreme Court validated the statute in the landmark ruling of *Missouri v. Holland*.³⁴ Justice Holmes's opinion established Congress' power to legislate activities within the state previously presumed that the Tenth Amendment of the United States Constitution reserved for the states.³⁵

or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, next, egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, next, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, the United States and the United Mexican States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972[,] and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

16 U.S.C. § 703 (2016) (emphasis in original).

32. See 16 U.S.C.S. § 707 (West 2016) (stating violations and penalties for MBTA); see also *CITGO Petroleum Corp.*, 801 F.3d at 488 (describing consequences associated with violations of MBTA).

33. See § 704 (explaining Secretary of Interior's power under MBTA).

[T]he Secretary of Agriculture [Secretary of the Interior] is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking . . . and to adopt suitable regulations permitting and governing the same, in accordance with such determinations[.]

Id.

34. See generally *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (upholding implementation of Migratory Bird Treaty Act against challenge of unconstitutionality). The United States Supreme Court's holding reads:

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.

Id.

35. See generally *id.* (explaining constitutional underpinnings of *Missouri v. Holland* decision).

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Since its Supreme Court validation in 1920, many court decisions have helped interpret the meaning of the statute's text.³⁶ As early as two decades before the MBTA's enactment, the debate over "taking" migratory birds came before the United States Supreme Court.³⁷ In *Geer v. Connecticut*,³⁸ the court convicted the defendant of unlawful intent to transport birds out of the state in violation of a Connecticut statute prohibiting such conduct.³⁹ The United States Supreme Court affirmed the convictions under the United States Constitution, citing the lawful regulation of killing, transporting, and taking birds.⁴⁰ The *Geer* court applied the common law meaning of "take" to wildlife: to "reduce those animals, by killing or capturing, to human control."⁴¹ Essential to that interpretation is the principle that "absent contrary indications, it is presumed that Congress intended to adopt the common law definition. . . ."⁴²

In *United States v. FMC Corporation*,⁴³ a challenge of a MBTA conviction reached the United States Court of Appeals.⁴⁴ In 1977, the Second Circuit heard appeals of eighteen United States District Court for the Western District of New York convictions for killing migratory birds based on the corporation's lack of intent to kill birds.⁴⁵ The prosecution indicted FMC Corporation on thirty-six counts of violating the MBTA for killing ninety-two migratory birds "by means of toxic and noxious waters. . . ."⁴⁶ On appeal, FMC Corporation argued that the killing of migratory birds must be an affirmative action or done with the intent to harm birds to sustain a

36. See Monica Carusello, *Can An Oil Pit Take A Bird? Why Migratory Bird Treaty Act Should Apply To Inadvertent Takings And Killings By Oil Pits*, 31 J. ENVTL. L. & LITIG. 87, 89-92 (2015) (noting key statutory interpretations of MBTA).

37. See generally *Geer v. Connecticut*, 161 U.S. 519, 521 (1896) (describing background of case on appeal to United States Supreme Court).

38. 161 U.S. 519 (1896).

39. *Geer v. Connecticut*, 161 U.S. 519, 521-22 (1896) (stating history of charges during appeal process).

40. See *id.* at 534-35 (explaining Supreme Court's holding in favor of Connecticut).

41. *CITGO Petroleum Corp.*, 801 F.3d at 489 (citing *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 717 (1995)) (discussing precedent *Geer* set).

42. *United States v. Shabani*, 513 U.S. 10, 13 (1994) (determining that common law definition should apply to terms in statutes unless otherwise text of statute makes clear).

43. 572 F.2d 902 (2d. Cir. 1978).

44. *United States v. FMC Corp.*, 572 F.2d 902, 902 (2d. Cir. 1978) (providing background on appeal for FMC Corporation).

45. See *id.* at 903 (providing background on appeal for FMC Corporation).

46. *Id.* (describing reasoning for indictment, which led to eighteen-count conviction that was appealed to Second Circuit).

conviction.⁴⁷ In affirming the convictions, the Second Circuit noted that FMC Corporation was not intentional in its actions, but instead, it was aware that the toxins were dangerous to humans.⁴⁸ Specifically, in its manufacturing process, FMC Corporation allowed these highly toxic chemicals to escape into a pond, which effectively killed the migratory birds.⁴⁹ Importantly, the court noted that while the statute was void of any scienter language, “[i]mposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party.”⁵⁰

The Ninth Circuit’s decision in *Seattle Audubon Society v. Evans*⁵¹ established a divide between United States Court of Appeals’ circuits.⁵² The Ninth Circuit made an important determination on the word “taking” in the MBTA in a consolidated appeal from decisions of the United States District Court for the Western District of Washington and the United States District Court for the District of Oregon that enjoined logging until protection for the northern spotted owl could be put into effect.⁵³ The Ninth Circuit determined that ambiguous terms in the MBTA, like “take” and “kill,” which do not specify a *mens rea* requirement, refer to “physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918.”⁵⁴

The Eighth Circuit joined the Ninth Circuit’s interpretation of “taking” six years later in its opinion in *Newton County Wildlife Association v. United States Forest Service*.⁵⁵ The Eighth Circuit heard the case after the United States District Court for the Eastern District of Arkansas denied Newton County Wildlife Association’s, the Sierra Club’s, and other individuals’ motions to enjoin the United States

47. *See id.* at 906 (recounting Defendant’s basis for appeal).

48. *FMC Corp.*, 572 F.2d at 908 (noting awareness of dangers as reasoning in affirming convictions).

49. *See id.* at 908 (explaining Second Circuit’s reasoning in affirming convictions).

50. *Id.* at 908 (making important distinction between universal strict liability for MBTA violations and case-by-case analysis).

51. 952 F.2d 297 (9th Cir. 1991).

52. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 297 (9th Cir. 1991) (holding “take” within MBTA does not include unintentional actions).

53. *Id.* at 302-03 (analyzing use of word “taking” in MBTA text).

54. *Id.* at 302 (stating court’s interpretation of “taking”); *see also* *Newton Cnty. Wildlife Ass’n v. United States Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (re-stating Ninth Circuit’s conclusion).

55. *See Newton Cnty. Wildlife Ass’n*, 113 F.3d at 115 (agreeing with Ninth Circuit’s interpretation in *Seattle Audubon Soc’y*).

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Forest Service from making sales of timber in the Ozark National Forest.⁵⁶ The plaintiffs argued on appeal that logging resulting from the timber sales would have a significantly negative, and possibly lethal, effect on migratory birds nesting in the forest.⁵⁷ The court explicitly stated, “[I]t would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds.”⁵⁸ In its opinion, the Eighth Circuit explicitly endorsed the Ninth Circuit’s interpretation of “taking” from *Seattle Audubon Society*.⁵⁹

The same year the Eighth Circuit decided *Newton County Wildlife Ass’n*, the Tenth Circuit Court of Appeals, in *United States v. Corrow*,⁶⁰ ruled that “[a]lthough we have not previously so held, we now join those Circuits which hold misdemeanor violations under [Section] 703 [MBTA] are strict liability crimes.”⁶¹ The facts of *Corrow* were unique in that the defendant was charged with selling feathers of migratory birds protected under MBTA.⁶² In rejecting the use of a scienter requirement for the MBTA, the court noted, “[I]t is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge.”⁶³

The Tenth Circuit affirmed this interpretation in *United States v. Apollo Energies, Inc.*,⁶⁴ stating that the holding in *Corrow* prevented the appellant’s argument that MBTA required an element of intent.⁶⁵ The *Apollo Energies* court elaborated on the interpretation principle that “[l]ike other regulatory acts where the penalties are small and there is ‘no grave harm to an offender’s reputation,’ the

56. *See id.* at 114 (stating procedural history prior to appeal).

57. *Id.* at 115 (noting plaintiffs’ argument on appeal for enjoining United States Forest Services from making timber sales).

58. *Id.* (emphasis in original) (reasoning that strict liability goes beyond legislators’ intent when Congress passed MBTA).

59. *See id.* (noting agreement between circuit courts). The court stated, “[W]e agree with the Ninth Circuit that the ambiguous terms ‘take’ and ‘kill’ in 16 U.S.C. § 703 mean ‘physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918.’” *Id.* (citation omitted).

60. 119 F.3d 796 (10th Cir. 1997).

61. *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997) (holding appellants strictly liable for MBTA violations).

62. *See id.* at 799 (citation omitted) (explaining count two of charges against defendant).

63. *Id.* at 805 (quoting *United States v. Manning*, 787 F.2d 341, 435 n.4 (8th Cir. 1986)) (stating proposition that MBTA violations are strict liability).

64. 611 F.3d 679 (10th Cir. 2010).

65. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684 (10th Cir. 2010) (explaining how *Corrow* specifically addressed *mens rea* requirement for MBTA).

Supreme Court has long recognized a different standard applies to those federal criminal statutes that are essentially regulatory.”⁶⁶ Plainly stated, the Tenth Circuit’s stance is that “[a]s a matter of statutory construction, the ‘take’ provision of the Act does not contain a scienter requirement.”⁶⁷

In 2002, the Fifth Circuit addressed the scienter requirement of the MBTA on appeal from the United States District Court for the Eastern District of Louisiana in *United States v. Morgan*.⁶⁸ The defendant appealed his conviction for a violation of the MBTA, arguing that it was not a strict liability offense and that he did not intend to surpass the daily bag limit while hunting.⁶⁹ After consulting precedent from other circuits and congressional intent, as well as reviewing the type of offense, the Fifth Circuit held that the possession of migratory birds in excess of the daily bag limit was a strict liability offense and, therefore, affirmed the convictions.⁷⁰

One of the more extensive discussions of statutory interpretation for the “taking” clause of the MBTA came from the United States District Court for the District of Colorado in *United States v. Moon Lake Electric Ass’n, Inc.*⁷¹ *Moon Lake Electric Ass’n, Inc.* involved the defendant’s motion to dismiss charges for violations of the Bald and Golden Eagle Protection Act and the MBTA for the death of seventeen birds that landed on the defendant’s electrical power lines.⁷² The defendant argued that the unintentional electrocution of a bird could not constitute a violation of the MBTA or the Bald and Golden Eagle Protection Act.⁷³

The defendant did not contest the Department of Interior’s definition of “take”; the court, therefore, adopted the Department’s

66. *Id.* (citation omitted) (explaining Supreme Court precedent for strict liability interpretation).

67. *Id.* at 686 (stating *Apollo Energies* court’s adherence to *Corrow* decision). The court stated, “[]We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.[]” *Id.* (internal quotation marks omitted) (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)).

68. *See United States v. Morgan*, 311 F.3d 611, 612–13 (5th Cir. 2002) (describing procedural history of case).

69. *See id.* at 612-13 (elaborating on factual background of convictions).

70. *Id.* at 616 (explaining various interpretations court consulted in reaching conclusion in favor of upholding convictions).

71. *See generally United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999) (analyzing “taking” as it pertains to use in other statutes, including Endangered Species Act).

72. *See id.* at 1071 (providing factual and procedural background to statutory discussion).

73. *See id.* at 1072 (discussing defendant’s argument in motion to court).

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interpretation of the MBTA.⁷⁴ The court looked to the statute's language for meaning, and concluded that "'[t]ake' is defined as to 'pursue, hunt, shoot, wound, kill, trap, capture, or collect.'" ⁷⁵ Next, the court addressed whether the MBTA only regulated intentional conduct, to which it cited *Corrow* for the proposition that violations of the MBTA constitute strict liability and do not require a finding of specific intent or criminal knowledge.⁷⁶ Finally, the court examined whether the MBTA was intended to regulate only the physical conduct typically associated with hunters and poachers.⁷⁷ In its analysis, the court found that the text of the statute not only included terms like hunting, capturing, shooting, and trapping, which directly identify with hunting and poaching; but, it also included terms, such as "pursuing, killing, wounding, collecting, possessing, offering for sale, selling, offering to barter, bartering, offering to purchase, purchasing, delivering for transportation, transporting, [and] carrying."⁷⁸ The court elected not to limit the scope of the statute to those that were acting as hunters and poachers, and opined that "in drafting the MBTA, Congress did not include any language that would suggest it intended to punish only those who act with specific motives."⁷⁹

While the MBTA's statutory interpretation question has not reached the United States Supreme Court, the Supreme Court has reviewed analogous language in the Endangered Species Act of 1973 (ESA).⁸⁰ The text of the ESA states, "Except as provided in sections 1535(g)(2) and 1539 of this title . . . it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States."⁸¹

74. *See id.* (explaining defendant's failure to object to Department of Interior's definition of "take"). The court stated, "Accordingly, I defer to the Department of Interior's definition of 'take' as a reasonable interpretation of the MBTA's plain language." *Id.* (citation omitted).

75. *Id.* at 1073 (quoting 50 C.F.R. § 10.12 (1997)).

76. *See Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d at 1073 (explaining district court's use of *Corrow* for determining *mens rea* requirement).

77. *See id.* at 1074-75 (noting defendant's argument that only hunting and poaching conduct is prohibited). "Moon Lake next argue[d] that the Acts prohibit only physical conduct normally exhibited by hunters or poachers." *Id.*

78. *Id.* at 1074 (contrasting words in statute directly associated with hunting and poaching and words that can be achieved without hunting or poaching).

79. *Id.* at 1075 (stating court's refusal to limit scope of MBTA to hunters and poachers).

80. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 690 (1995) (analyzing use of "take" in text of Endangered Species Act); *see also* 16 U.S.C. § 1531 et seq. (2016) (codifying Endangered Species Act of 1973).

81. *Babbitt*, 515 U.S. at 690-91 (providing text of statute under review).

The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁸² Furthermore, it is the late Justice Antonin Scalia’s dissent in *Babbitt v. Sweet Home Chapter, Communities for a Great Oregon*⁸³ that provides the most informative discussion of “take.”⁸⁴ In his dissent, Justice Scalia notes, “I, too, think it would not violate the Act . . . but for the textual reason that only action directed at living animals constitutes a ‘take.’”⁸⁵

In addition to historical precedent, the Fifth Circuit’s development of a standard of review and statutory interpretation principles proved vital to the outcome of this case.⁸⁶ In determining the standard of review on appeal for jury instructions, the Fifth Circuit indicated, in its decision in *United States v. Williams*,⁸⁷ that the district court has significant discretion in describing the law to the jury.⁸⁸ Under this standard, the court examined only whether the district court provided a “correct statement of the law and whether it clearly instructed the jurors as to the principles of the law applicable to the factual issues confronting them.”⁸⁹ Consequently, judicial review of jury instructions has been limited to an examination for abuse of discretion.⁹⁰

The court was also limited by its adopted statutory interpretation principles, such as using the same rules of construction for in-

82. *Id.* at 691 (citing 16 U.S.C. § 1532(19)) (defining word “take” as used in ESA).

83. 515 U.S. 687 (1995).

84. *See id.* at 735 (Scalia, J., dissenting) (noting Justice Scalia’s textual analysis). “[O]nly action directed at living animals constitutes a ‘take.’” *Id.*

85. *Id.* (explaining disagreement with majority based on statutory analysis of “take”).

86. *See KCMC, Inc. v. FCC*, 600 F.2d 546, 549 (5th Cir. 1979) (explaining Fifth Circuit statutory interpretation rules of construction); *see also Shabani*, 513 U.S. at 13 (noting presumption of common law definition). “[A]bsent contrary indications, it is presumed that Congress intended to adopt the common law definition. . . .” *Id.*; *see, e.g. Corley v. United States*, 556 U.S. 303, 314 (2009) (giving effect to all provisions of statute).

87. 610 F.3d 271 (5th Cir. 2010).

88. *United States v. Williams*, 610 F.3d 271, 285 (5th Cir. 2010) (reviewing jury instructions for abuse of discretion); *see also United States v. Santos*, 589 F.3d 759, 764 (5th Cir. 2009) (quoting *United States v. Orji-Nwosu*, 549 F.3d 1005, 1008 (5th Cir. 2008)).

89. *Orji-Nwosu*, 549 F.3d at 1008 (quoting *United States v. Young*, 282 F.3d 349, 353 (5th Cir. 2002)) (stating court’s standard of review).

90. *See Santos*, 589 F.3d at 764 (explaining appellate standard of review for jury instructions).

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terpreting regulations or statutes.⁹¹ Of note, the Fifth Circuit determined in *United States v. Clark*⁹² that a “statute must be strictly construed and ‘cannot be enlarged by analogy or expanded beyond the plain meaning of the words used.’”⁹³ The Fifth Circuit took this principle a step further in *Diamond Roofing Co. v. Occupational Safety and Health Review Comm’n*⁹⁴ by establishing the precedent that a regulation, which subjects a private party to civil or criminal sanctions, must be narrowly construed to the expressed meaning of the regulation.⁹⁵

To date, there is no consensus on interpreting and enforcing the MBTA.⁹⁶ Ultimately, when *CITGO Petroleum Corp.* reached the Fifth Circuit on appeal, the court had to consider different holdings from four circuits that implicated multiple interpretations of the text of the regulation.⁹⁷

IV. NARRATIVE ANALYSIS

In *CITGO Petroleum Corp.*, the Fifth Circuit focused on two issues: (1) the CAA convictions for equalization tanks functioning as an oil-water separator, and (2) the MBTA convictions for “takings.”⁹⁸ To address the CAA convictions, the court focused on the express text of Subpart QQQ of the CAA, as well as the promulgation history of the section.⁹⁹ In reviewing the MBTA convictions, the court analyzed the text of the regulation, significant case law

91. See *KCMC, Inc.*, 600 F.2d at 549 (noting interpretation rules are same for regulations and statutes). “[I]n constructing a regulation, we must employ the rules of construction generally applicable to statutes.” *Id.*

92. 412 F.2d 885 (5th Cir. 1969).

93. *Id.* at 890 (quoting *Chappell v. United States*, 270 F.2d 274, 278 (9th Cir. 1959)) (noting standard for statutory interpretation).

94. 528 F.2d 645 (5th Cir. 1976).

95. See *id.* at 649 (explaining use of express meaning rather than intended meaning of regulating agency). “If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.” *Id.* (citing *Brennan v. Occupational Safety & Health Review Comm’n*, 488 F.2d 337, 338-39 (5th Cir. 1973)).

96. For a further explanation of the current split among federal courts on statutory interpretation of MBTA, see *supra* note 2 and accompanying text.

97. See *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 491-93 (5th Cir. 2015) (analyzing previous decisions from Second, Eighth, Ninth, and Tenth Circuits).

98. *Id.* at 479 (stating defendant’s primary challenges on appeal).

99. For a further discussion of the Court’s analysis of Subpart QQQ, see *infra* notes 101-124 and accompanying text.

from sister jurisdictions, and the district court's opinion in this case.¹⁰⁰

A. Oil-Water Separator

The Fifth Circuit began its analysis with CITGO's challenge to the CAA conviction, alleging that the equalization tank operated as an oil-water separator.¹⁰¹ The issue centered on the trial court's instructions to the jury, which presented the "definition of an oil-water separator, but then added: '[t]he definition of oil-water separator does not require that [it] have any or all of the ancillary equipment mentioned. . . . An oil-water separator is defined by how it is used.'"¹⁰² In contrast, Subpart QQQ's definition of an oil-water separator combines both an analysis of how the tank is used and the necessary components that make up the separator.¹⁰³ Despite the court providing the jury with the exact text of Subpart QQQ, the jury instructions influenced the verdict, requiring reversal for harmful error on the CAA convictions.¹⁰⁴

The Fifth Circuit embarked on an analysis of regulatory interpretation after reaching its conclusion that the jury instructions misinterpreted the proper meaning of CAA Subpart QQQ.¹⁰⁵ Establishing a framework for regulatory interpretation, the court relied on the same interpretation principles for regulations as it does for statutes.¹⁰⁶ Using this structure, the court examined the plain text of the regulation.¹⁰⁷ The court specifically noted that regulations with criminal penalties must be examined narrowly without being enlarged beyond the commonly understood meanings of the words.¹⁰⁸ The regulation, therefore, should be strictly analyzed

100. For a further discussion of the Court's analysis of MBTA, see *infra* notes 125-173 and accompanying text.

101. *CITGO Petroleum Corp.*, 801 F.3d at 481 (describing first issue on appeal).

102. *Id.* (noting defendant's contention on appeal from decision) (citing *United States v. CITGO Petroleum Corp.*, No. C-06-563, 2011 U.S. Dist. LEXIS 32004, at *7 (S.D. Tex. Mar. 28, 2011)).

103. *Id.* (stating Subpart QQQ definition of oil-water separator).

104. *See id.* (reversing convictions because of harmful error in jury instructions).

105. *See id.* at 482 (explaining court's interpretive framework for statutes).

106. *See CITGO Petroleum Corp.*, 801 F.3d at 482 (explaining interpretation of regulations has same framework as statutes). "This court applies the same interpretive framework to regulations as to statutes." *Id.* (citing *KCMC, Inc. v. F.C.C.*, 600 F.2d 546, 549 (5th Cir. 1979)).

107. *See id.* (indicating court's analysis framework).

108. *Id.* (describing importance of applying express meaning of regulation).

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based on the expressed terms of the regulation, rather than the agency's intended meaning.¹⁰⁹

The issue centered on the regulation's definition of an oil-water separator, which listed specific parts that comprise the oil-water separator.¹¹⁰ The definition unquestionably covered oil-water separators at CITGO's refinery, but it was unclear whether the language encompassed other equipment functioning similar to an oil-water separator, specifically, the equalization tank in this controversy.¹¹¹ In its analysis, the court simplified the test to two elements: (1) the equipment must functionally separate oil from water, and (2) the equipment must be comprised of specific parts.¹¹² Constitutional avoidance, moreover, prevented interpreting the definition from including equipment lacking some of the listed parts.¹¹³

Pursuant to these interpretation principles, the Fifth Circuit concluded that the equalization tanks in question, despite having skimmers, were lacking "weirs, grit chambers, and sludge hoppers."¹¹⁴ As a result, the tanks did not qualify as oil-water separators under Subpart QQQ, and, therefore, CITGO did not violate the CAA.¹¹⁵ The court's analysis further noted that Subpart Kb gov-

109. *See id.* (quoting *Diamond Roofing Co. v. Occupational Safety & Health Review Com.*, 528 F.2d 645, 649 (5th Cir. 1976)) (establishing standard for interpretation of statute).

110. *See id.* (describing 40 C.F.R. § 60.691).

An oil-water separator . . . is wastewater treatment equipment[] used to separate oil from water consisting of a separation tank, which also includes the forebay and other separator basins, skimmers, weirs, grit chambers, and sludge hoppers. Slop oil facilities, including tanks, are included in this term along with storage vessels and auxiliary equipment located between individual drain systems and the oil-water separator. This term does not include storage vessels or auxiliary equipment[,] which do not come in contact with or store oily wastewater.

Id.

111. *See id.* at 483 (reframing issue to whether express text of regulation encompasses equipment other than oil-water separators or equipment functioning similarly).

112. *CITGO Petroleum Corp.*, 801 F.3d at 483 (stating two requirements under Subpart QQQ definition of oil-water separator). "Obviously, the equipment covered by Subpart QQQ must be 'used to separate oil from water.' Second and more critically, the equipment 'consist[s] of' certain parts—that is, an oil-water separator is 'composed or made up of' particular things." *Id.* (citation omitted).

113. *See id.* at 484 n.6 (noting constitutional avoidance requires courts to avoid interpretations that "engender[] constitutional issues if [] reasonable alternative interpretation poses no constitutional question").

114. *Id.* at 483 (stating equalization tanks could not be considered oil-water separators).

115. *Id.* (holding CITGO could not be found guilty of violating Subpart QQQ because Tanks 116 and 117 do not fall within definition of oil-water separator).

erned storage vessels involved in the water treatment system, such as CITGO's refinery equalization tanks.¹¹⁶

To foreclose the government's argument that Subpart QQQ included equalization tanks, the court analyzed the promulgation history.¹¹⁷ The EPA found it "environmentally prudent" to regulate all parts of the wastewater treatment system in the original promulgation.¹¹⁸ In response to the proposed regulations, several refinery operators, including CITGO, and many commentators, objected to the proposed regulation that covered equalization tanks and air flotation systems due to cost and safety concerns.¹¹⁹ Commentators suggested that placing roofs on equalization tanks and air flotation systems would actually increase the risk of explosions and fires, as well as impair the efficiency of the wastewater treatment system.¹²⁰

In light of the industry comments, the EPA made significant changes to Subpart QQQ as part of their reevaluation.¹²¹ In the Background for Promulgated Standards, the agency noted that the industry concerns about safety could not be overcome in a cost-effective manner.¹²² Subsequently, air flotation systems, "equalization basins[,] and other . . . equipment between the oil-water separator and air flotation system" are excluded from the final regulation.¹²³ The court ultimately held that "history points to the same conclusions as Subpart QQQ's text: Subpart QQQ governs oil-water separators but not equalization tanks."¹²⁴

116. *Id.* at 485 (explaining Subpart Kb, 40 C.F.R. § 60.110b(a), controls).

117. *See CITGO Petroleum Corp.*, 801 F.3d at 486 (examining promulgation history based on considerable time parties spent analyzing it in support of respective conclusions).

118. *Id.* (noting need to regulate all emissions points "from which VOC vapors might be emitted").

119. *Id.* (providing background on comments to originally proposed regulation).

120. *See id.* at 486-87 (explaining substantial safety risks associated with proposed regulation).

121. *See id.* at 487 (describing substantial revision to regulation based on industry comments).

122. *CITGO Petroleum Corp.*, 801 F.3d at 487 (noting industry could not overcome safety and cost concerns).

123. *Id.* (internal quotation marks omitted) (quoting *United States v. Gonzales*, 520 U.S. 1, 1-2 (1997)) (stating exclusion of equalization tanks from final promulgated regulation due to safety and cost concerns).

124. *Id.* (holding promulgation history affirms earlier analysis of regulation's text).

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B. Migratory Bird Treaty Act

Next, the court faced the task of deciding whether to reverse or affirm CITGO's convictions under MBTA.¹²⁵ The discussion began with the history of the MBTA, namely, the adoption of the MBTA to implement the Preservation of Migratory Birds Treaty that the United States and the United Kingdom created, acting on behalf of Canada.¹²⁶ The court began its analysis with the conclusions of the trial court.¹²⁷

In delivering its opinion, the district court reached three notable conclusions.¹²⁸ First, the district court concluded that "an illegal 'taking' is an ambiguous term that involves more activities than those related to hunting, poaching[,] and intentional acts against migratory birds."¹²⁹ Subsequently, the court concluded that under the MBTA, only proximate causation of a "taking" was necessary to satisfy strict liability.¹³⁰ Finally, the district court concluded that CITGO's violation of the regulations were enough to sustain the company's misdemeanor convictions.¹³¹ Buoyed by the regulation's text, analysis of similar regulations and statutes, its understanding of relevant case law, and the critique of the district court's reasoning, the Fifth Circuit held that "a 'taking' is limited to deliberate acts done directly and intentionally to migratory birds[:]" the court, therefore, overturned CITGO's MBTA convictions.¹³²

1. Text of Regulation

CITGO's conviction arose from "taking" migratory birds, and as a result, the Fifth Circuit confined its interpretation to that specific term.¹³³ The court took the stance that Congress adopted the

125. *See id.* at 488 (describing second issue analyzed on appeal).

126. *See id.* (explaining adoption of MBTA in 1918 based on international treaty desiring preservation of migratory birds).

127. *See CITGO Petroleum Corp.*, 801 F.3d at 488 (stating district court's holding).

128. *See id.* (noting district court's canvassing of case law, drawing three "significant" conclusions).

129. *Id.* at 488 (citing *United States v. CITGO Petroleum Corp.*, 893 F. Supp. 2d 841, 843-45 (S.D. Tex. 2012)) (describing district court's first major conclusion).

130. *Id.* (describing district court's second major conclusion).

131. *Id.* (describing district court's third major conclusion).

132. *CITGO Petroleum Corp.*, 801 F.3d at 488-89 (reversing convictions based on variety of sources).

133. *See id.* at 489 (noting court's decision to confine discussion to "take"). In dicta, however, the court endorsed a similar interpretation of the word "kill," limiting its interpretation to intentional acts. *See id.* at 489 n.10.

common law definition of “take” in promulgating the MBTA.¹³⁴ As it applies to migratory birds and wildlife in general, the term “take” is defined as “reduc[ing] those animals, by killing or capturing, to human control.”¹³⁵ Furthermore, at the time the MBTA passed, “take” was a well-defined, unambiguous term of art.¹³⁶ In its interpretation, the court concluded that an affirmative act, which could not happen by accident or omission, was required to reduce an animal to human control.¹³⁷

2. *Similar Regulations and Statutes*

The court examined statutes enacted more than fifty years after the MBTA to demonstrate Congress’ ability to expand “take” beyond the common law definition when necessary, thus affirming the notion that the MBTA was meant to be interpreted under the common law definition.¹³⁸ First, the court examined the ESA, which includes the term “take”; unlike the MBTA, however, the ESA includes an express definition for “take,” encompassing the following acts: “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹³⁹ The terms “harass” and “harm” serve to include unintentional acts or omissions under the common law definition.¹⁴⁰ In including “harass” and “harm” in its definition, Congress made a deliberate decision to include actions or omissions broader than those encompassed by the common law definition.¹⁴¹

Next, the court examined the Marine Mammal Protection Act (MMPA).¹⁴² In the MMPA, Congress included the term “harass” in

134. *See id.* at 489 (stating court’s presumption in favor of adopting common law definition).

135. *Id.* (internal quotation marks omitted) (quoting *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995)) (defining “take” under common law).

136. *See id.* (explaining meaning of “take” when MBTA was passed in 1918).

137. *CITGO Petroleum Corp.*, 801 F.3d at 489 (providing previous Supreme Court interpretations of “take”).

138. *See id.* at 490 (explaining later enacted statutes expressly included accidental or indirect harm to animals).

139. *Id.* (internal quotation marks omitted) (emphasis in original) (quoting 16 U.S.C. § 1532(19)) (defining “take” in ESA).

140. *See id.* (explaining Congress’ deliberate modification of “take” common law definition in ESA).

141. *See id.* (explaining expanded definition of “take” in ESA); *see also Babbitt*, 515 U.S. at 707 (approving expanded reading of “take”).

142. *See CITGO Petroleum Corp.*, 801 F.3d at 490 (analyzing “take” as defined in MMPA).

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its definition of “take.”¹⁴³ The court noted this affirmative choice represents legislative intent to include not just intentional acts, but also those affecting marine mammals through negligence or indirect acts or omissions.¹⁴⁴ As a result of the analysis of the ESA and the MMPA, the court concluded that Congress knew when to expressly include unintentional or negligent behavior in its statutes, and its failure to include the terminology of “harm” or “harass” in the MBTA was an intentional choice to adopt the common law definition.¹⁴⁵

3. *Sister Jurisdiction Case Law*

After finalizing its conclusion based on the regulation’s text, the court embarked on an analysis of relevant case law from sister jurisdictions.¹⁴⁶ The Second Circuit, in its holding in *FMC Corporation*, read the MBTA broadly to impose strict liability, punishing accidental and indirect acts.¹⁴⁷ The court explained that the Second Circuit reached its decision by balancing the intent of the MBTA against “‘a reluctance to charge anyone with a crime which he does not know he is committing. . . .’”¹⁴⁸ Ultimately, the Second Circuit reasoned that the expanded liability its reading of the statute created could be alleviated by “sound prosecutorial discretion,” thus holding violations of the MBTA are strict liability offenses.¹⁴⁹

The court then addressed the Tenth Circuit’s holding in *Apollo Energies* and employed similar reasoning to the Second Circuit.¹⁵⁰ In rejecting the defendant’s arguments against imposing strict liability for violation of the MBTA, the Tenth Circuit concluded that it was “obvious” that the MBTA applied to “‘activities beyond purposeful hunting or possession of migratory birds.’”¹⁵¹ The *Apollo*

143. *See id.* (quoting 16 U.S.C. §1362(13)) (explaining Congress’ choice to include “harass” in definition of “take” in MMPA).

144. *Id.* (stating negligent acts that indirectly disturb marine mammals are encompassed in “harass”).

145. *Id.* at 490-91 (discussing Congress’ intentional choice to not include modifying terms in MBTA). “Harm and harass are the terms Congress uses when it wishes to include negligent and unintentional acts within the definition of ‘take.’ Without these words, ‘take’ assumes its common law definition.” *Id.* at 491.

146. *See generally id.* at 491-93 (analyzing decisions from Second, Eighth, Ninth, and Tenth Circuits).

147. *See CITGO Petroleum Corp.*, 801 F.3d at 491-92 (explaining Second Circuit’s reading of MBTA).

148. *Id.* at 492 (explaining Second Circuit’s balancing test in *FMC Corp.*).

149. *Id.* (describing Second Circuit’s holding).

150. *See id.* (analyzing Tenth Circuit’s decision in *Apollo Energies*).

151. *Id.* (citation omitted) (describing Tenth Circuit’s reasoning for rejecting defendant’s arguments).

Energies court also held that the MBTA was not unconstitutionally vague.¹⁵² The court rejected the Second Circuit's and Tenth Circuit's broad reading in favor of the express meaning of the regulation's text.¹⁵³ The court explained that, at the most fundamental level, these decisions "confuse the *mens rea* and the *actus reus* requirements."¹⁵⁴ For example, the court noted that by not requiring an affirmative action, the Second Circuit and Tenth Circuit potentially impose liability on "[a] person whose car accidentally collided with the bird. . . ."¹⁵⁵ Thus, the Fifth Circuit determined that the action, "to take," even without strict liability, is something that must be done "knowingly" or "voluntarily."¹⁵⁶ In rejecting the other circuits' conclusions, the court went a step further and suggested that the Second Circuit's and Tenth Circuit's outcomes may have been different if the defendants' lawyers made the proper arguments about the common law definition of "take" in the MBTA.¹⁵⁷

4. District Court Decision

In its decision, the district court elected to follow the Tenth Circuit's precedent that a "taking" can be involuntary, noting that it was "'obvious' that 'unprotected oil field equipment can take or kill migratory birds.'"¹⁵⁸ Further, the district court applied the Tenth Circuit's "proximate cause requirement" to find "that the birds' deaths were directly, foreseeably caused by the lack of roofing on Tanks 116 and 117."¹⁵⁹ The district court distinguished this case from other MBTA oil field equipment cases because, in this case, CITGO's tanks were uncovered, and thus, in violation of the CAA and Texas state law.¹⁶⁰

152. See *CITGO Petroleum Corp.*, 801 F.3d at 492 (describing Tenth Circuit's reasoning for rejecting defendant's arguments).

153. See *id.* (declining to adopt Second Circuit's and Tenth Circuit's strict liability interpretation of Second Circuit and Tenth Circuit).

154. *Id.* (explaining court's fundamental disagreement with sister jurisdictions' holdings).

155. *Id.* at 493 (providing example that not requiring affirmative act creates inappropriate liability).

156. *Id.* at 492 (noting *actus reus*, rather than *mens rea*, requires affirmative act).

157. *CITGO Petroleum Corp.*, 801 F.3d at 492 (describing court's admonishment for defendants' attorneys failing to argue meaning of "take").

158. *Id.* at 493 (explaining district court's agreement with Tenth Circuit).

159. *Id.* (citation omitted) (applying proximate cause to migratory bird "takings").

160. See *id.* (noting difference between present case and others because of additional CAA violation). "The court distinguished its result from other district court cases that dismissed similar MBTA indictments arising from oil field opera-

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In reversing and remanding the case with instructions, the Fifth Circuit noted two major flaws in the district court's reasoning: (1) the district court's conclusion that migratory bird deaths should be criminalized when they result from violations of federal or state laws is not supported by any textual basis; and (2) CITGO was not in violation of the CAA.¹⁶¹ In basing its MBTA decision on alleged violations of federal or state law, overturning the CAA conviction itself necessitated overturning the MBTA conviction.¹⁶² Thus, the Fifth Circuit held that "even under the district court's erroneous legal interpretation, the MBTA convictions must be overturned."¹⁶³

In a final point of support for its holding, the Fifth Circuit looked at the application of the strict liability interpretation.¹⁶⁴ Notably, the court alluded to the unrealistic enforcement of strict liability in a variety of scenarios.¹⁶⁵ For instance, anywhere between ninety-seven million and 976 million birds perish each year by running into windows.¹⁶⁶ Cars kill an additional sixty million birds each year.¹⁶⁷ Additionally, while nationwide statistics are not available, in the state of Wisconsin, domestic cats kill thirty-nine million birds each year.¹⁶⁸ Under the logic promulgated by the jurisdictions that hold defendants liable for all acts, direct or indirect, with proximate cause, "all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA."¹⁶⁹

In rejecting this approach, the court noted that the only protection afforded to "violators" under the proposed system was

tions because CITGO left Tanks 116 and 117 uncovered in violation of the Clean Air Act and Texas law." *Id.*

161. *Id.* (pointing out district court's major flaws in opinion).

162. *See CITGO Petroleum Corp.*, 801 F.3d at 493 (explaining how district court's MBTA conviction reliant on CAA conviction).

163. *Id.* (holding flawed reasoning required overturning of district court's opinion).

164. *See id.* at 493-94 (applying strict liability interpretation, which Second Circuit, Tenth Circuit, and district court endorsed to determine potential for overly expansive scope of Act).

165. *See id.* at 494 (explaining significant number of accidental migratory bird deaths each year that could be prosecuted under strict liability interpretation of MBTA).

166. *Id.* at 493-94 (citing U.S. Fish and Wildlife Service statistics on deaths of birds that run into windows).

167. *CITGO Petroleum Corp.*, 801 F.3d at 493-94 (citing statistics from U.S. Fish and Wildlife Service on vehicular-caused bird deaths).

168. *Id.* (citing U.S. Fish and Wildlife Service statistics on bird deaths from cats).

169. *Id.* (suggesting strict liability takes MBTA to such broad extremes as to be unreasonable).

prosecutorial discretion, which is an insufficient barrier to prevent severe penalties of up to fifteen thousand dollars or six months in prison, or both for unintentional violators.¹⁷⁰ The irrational consequences of a strict liability interpretation provided the final notch of support for the Fifth Circuit's holding that the MBTA does not punish unintentional acts or omissions.¹⁷¹ After this analysis, the Fifth Circuit held that, "Subpart QQQ only regulates equipment conventionally, not merely functionally, known as oil-water separators . . ." ¹⁷² As such, the court reversed the convictions and remanded the case to the district court "with instructions to enter a judgment of acquittal. . . ." ¹⁷³

V. CRITICAL ANALYSIS

The court in *CITGO Petroleum Corp.* held that CITGO did not violate the CAA because CITGO's equalization tanks did not constitute an oil-water separator.¹⁷⁴ In addition, CITGO did not violate the MBTA because unintentional or negligent acts are not considered "takings."¹⁷⁵ The court based these rulings on an in-depth statutory analysis and review of relevant case law.¹⁷⁶ Section I of the court's opinion discussed the court's finding of reversible error with the jury instructions in regard to the CAA.¹⁷⁷ Section II of the court's opinion concluded that the MBTA's ban on "takings" is directed at intentional acts rather than unintentional or negligent actions.¹⁷⁸

170. *Id.* (rebuking idea of prosecutorial discretion as protection to indirect violations of MBTA).

171. *See id.* (stating absurd results further support interpretation that Congress intended common law definition of "take").

172. *CITGO Petroleum Corp.*, 801 F.3d at 494 (restating Court's reasoning for reversing and remanding with instructions). The court's holding states:

Subpart QQQ only regulates equipment conventionally, not merely functionally, known as oil-water separators. . . . Equalization Tanks 116 and 117 at CITGO's Corpus Christi refinery are outside the regulatory definition and thus are not "oil-water separators" . . . the MBTA's ban on "takings" only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds.

Id.

173. *Id.* (holding in favor of acquittal on Counts Four, Five, Eight, Nine, and Ten).

174. *Id.* (reversing district court's conviction).

175. *See id.* (reversing district court's conviction).

176. For a further discussion of the court's analysis and findings, see *supra* notes 125-173 and accompanying text.

177. For a further discussion on the CAA convictions, see *supra* notes 101-124 and accompanying text.

178. For a further discussion on the MBTA convictions, see *supra* notes 125-173 and accompanying text.

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A. What Is An Oil-Water Separator?

On appeal, the Fifth Circuit, in Section I, determined whether jury instructions given at trial properly defined an oil-water separator.¹⁷⁹ In essence, the question was simply the definition of an oil-water separator.¹⁸⁰ In its analysis, the court began with the text of the regulation at issue, Subpart QQQ of the CAA.¹⁸¹ Addressing the plain text of the regulation, the court held that the regulation requires two elements: (1) the equipment must functionally separate oil from water; and (2) the equipment must be comprised of particular parts.¹⁸² In doing so, the court took the interpretation a step further, employing the principle of constitutional avoidance to determine that any equipment not comprised of all the parts listed could not be considered an oil-water separator.¹⁸³ The court found that the district court's description of an oil-water separator, based solely on the function, rather than components, did not comport with the text of Subpart QQQ of the CAA.¹⁸⁴ This ruling allowed the court to determine that CITGO's equalization tanks, which lacked necessary parts, such as grit chambers, sludge hoppers, and weirs, did not qualify as oil-water separators and thus, CITGO could not be punished under the CAA.¹⁸⁵

The Fifth Circuit elected to continue its analysis with the promulgation history of the CAA and Subpart QQQ.¹⁸⁶ The court's revelation that the EPA made significant drafting changes to Subpart QQQ in response to comments from several refinery operators shed new light on the intended meaning of the regulation.¹⁸⁷ The EPA originally intended a broad-sweeping regulation that encom-

179. See *CITGO Petroleum Corp.*, 801 F.3d at 481 (stating court's first issue on appeal).

180. For a further discussion of the court's analysis and findings, see *supra* notes 101-124 and accompanying text.

181. For a further discussion of the court's analysis, see *supra* notes 101-124 and accompanying text.

182. For a further discussion of the Fifth Circuit's application of oil-water separator, see *supra* notes 110-116 and accompanying text.

183. For a further discussion of the Fifth Circuit's constitutional avoidance, see *supra* note 113 and accompanying text.

184. *CITGO Petroleum Corp.*, 801 F.3d at 481 (explaining why jury instructions were inadequate).

185. *Id.* at 483 (holding CITGO could not be found guilty of violating Subpart QQQ because Tanks 116 and 117 do not fall within definition of oil-water separator).

186. For a further discussion of the court's analysis and findings, see *supra* notes 101-124 and accompanying text.

187. For a further discussion of the court's analysis and findings, see *supra* notes 117-120 and accompanying text.

passed all parts of the wastewater treatment system.¹⁸⁸ Responding to the industry's comments to the original Subpart QQQ text, the EPA noted that equalization tanks, as well as other auxiliary tanks, basins, and equipment that function between the oil-water separator and the air flotation system, were excluded from the final regulation.¹⁸⁹ Thus, the Court's holding that CITGO could not be held liable for CAA violations for its equalization tanks was consistent both in its statutory interpretation and the promulgation history.¹⁹⁰

B. What If It Was Not Intentional?

In Section II, the Fifth Circuit faced a much more convoluted analysis based on the breadth of the case law on the MBTA and the lack of consensus among the jurisdictions.¹⁹¹ Facing case law from four other circuits, the Fifth Circuit had to distinguish its holding from the Second and Tenth Circuits through facts and law.¹⁹² The court began its analysis of case law by reviewing the district court's decision.¹⁹³ The district court reached two conclusions in regard to the MBTA convictions: (1) "taking" is "an ambiguous term that involves more activities than those related to hunting, poaching and intentional acts against migratory birds[,] and (2) only proximate cause is required for strict liability."¹⁹⁴ It is important to note that MBTA includes the word "kill" in its definition, but the Fifth Circuit focused solely on the word "take" because it was the term used in CITGO's original indictment.¹⁹⁵ In reaching these conclusions, the district court noted it was obvious that unintentional deaths of mi-

188. For a further discussion of the original intention of the regulation, see *supra* note 118 and accompanying text.

189. For a further discussion on the changes to the regulation after industry comments, see *supra* notes 119-122 and accompanying text.

190. For a further discussion of the court's analysis and findings, see *supra* notes 101-124 and accompanying text.

191. For a further discussion of the court's analysis and findings, see *supra* notes 125-173 and accompanying text.

192. For a further discussion of the court's analysis and findings, see *supra* notes 146-157 and accompanying text.

193. See *CITGO Petroleum Corp.*, 801 F.3d at 488 (reviewing district court's convictions).

194. *Id.* (stating district court's two MBTA conclusions). Additionally, for a further discussion of district court's conclusions, see *supra* notes 158-163 and accompanying text.

195. Alexander Obrecht, *Migratory Bird Treaty Act: Question Of Unintentional "Take" Primed For Potential Fifth Circuit En Banc Or Supreme Court Review*, BAKERHOSSETLER (Oct. 1, 2015), <http://www.jdsupra.com/legalnews/migratory-bird-treaty-act-question-of-42665/> (explaining Fifth Circuit's focus on "take" instead of "kill").

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gratory birds from oil field equipment were “takings.”¹⁹⁶ To reverse the convictions, the Fifth Circuit anchored its holding in the decisions of the Eighth Circuit and Ninth Circuit that “takings” punish only intentional actions.¹⁹⁷

To join the Eighth and Ninth Circuits, the Fifth Circuit needed to effectively distinguish this case from the Second Circuit’s holding in *FMC Corp.* and the Tenth Circuit’s holding in *Apollo Energies, Inc.*¹⁹⁸ In response to the sister jurisdiction precedent, which the district court found persuasive, the *CITGO Petroleum Corp.* court refused “to adopt the broad, counter-textual reading of the MBTA by these circuits.”¹⁹⁹ To explain its reasoning, the Fifth Circuit stated, “More fundamentally, we disagree that because misdemeanor MBTA violations are strict liability crimes, a ‘take’ includes acts (or omissions) that indirectly or accidentally kill migratory birds.”²⁰⁰ The Fifth Circuit concluded that the Second Circuit and Tenth Circuit confused the requirements of *mens rea* with those of the *actus reus*.²⁰¹ In its holding, the Fifth Circuit court explained that “requiring defendants, as an element of an MBTA misdemeanor crime, to take an affirmative action to cause migratory bird deaths is consistent with the imposition of strict liability.”²⁰² As a result of its review of case law, the Fifth Circuit’s holding was consistent with common law precedent and fundamental principles of statutory interpretation.²⁰³

VI. IMPACT

The Fifth Circuit’s decision in *CITGO Petroleum Corp.* increases the division among federal appeals courts when interpreting “takings” in the MBTA.²⁰⁴ Because the MBTA employs the common law definition of “take,” which excludes negligent and uninten-

196. *CITGO Petroleum Corp.*, 801 F.3d at 493 (explaining district court’s adoption of Tenth Circuit’s position).

197. *See id.* at 489 (agreeing with Eighth and Ninth Circuits).

198. For a further discussion of the court’s analysis and findings, see *supra* notes 146-157 and accompanying text.

199. *CITGO Petroleum Corp.*, 801 F.3d at 492 (taking contrary approach to Second and Tenth Circuits).

200. *Id.* (explaining disagreement with Second and Tenth Circuits).

201. *Id.* (stating basis for disagreement).

202. *Id.* (quoting *United States v. Morgan*, 311 F.3d 611, 616 (5th Cir. 2002)) (requiring affirmative action for MBTA liability).

203. For a further discussion of the court’s analysis and findings, see *supra* notes 98-173 and accompanying text.

204. For a further discussion of the current circuit split, see *supra* notes 146-157 and accompanying text.

tional acts, the court reversed the convictions.²⁰⁵ The Fifth Circuit became the fifth federal appeals court to weigh in on the debate, joining the Eighth and Ninth Circuits in opposing the Second's and Tenth Circuit's strict liability interpretation.²⁰⁶ This circuit split makes it increasingly likely that the United States Supreme Court will address the interpretation of "takings."²⁰⁷

The court's resolution of imposing strict liability on "takings" is viewed as overreaching.²⁰⁸ Commentators who are against punishing unintentional acts note that prosecutorial discretion is the only barrier to punishment for MBTA "takings" violations; these unprotected violations could include children hitting baseballs that strike birds, car drivers colliding with birds, individuals owning large windows that birds fly into, or even cat owners whose animals act on their natural instincts.²⁰⁹ The Fifth Circuit's holding limited this overbroad understanding and decreased the MBTA risk of punishment for unintentional bird deaths.²¹⁰

The softened stance on "takings" makes challenges to convictions in Louisiana, Mississippi, and Texas, likely and will cause those states to become significantly more attractive to industrial manufacturing.²¹¹ Industrial manufacturers will be more likely to conduct business in those states, as compared to states, such as Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, in which the Tenth Circuit imposes strict liability.²¹² The issue of liability for unintentional actions has not been addressed in eight circuits.²¹³ In effect, the circuits have created a "regional schism" that the United States Supreme Court or congressional action must resolve.²¹⁴ While the Fifth Circuit reached a "clean, logical, and historically accurate resolution" to MBTA "takings," this holding will have to

205. See *CITGO Petroleum Corp.*, 801 F.3d at 492 (holding MBTA adopts common law definition of "take").

206. For a further discussion of the current circuit split, see *supra* notes 146-157 and accompanying text.

207. See Obrecht, *supra* note 195 (explaining ripeness for review by United States Supreme Court).

208. For a further discussion of the strict liability consequences, see *supra* notes 158-163 and accompanying text.

209. Carusello, *supra* note 36 (discussing prosecutorial discretion as limiting force).

210. See Obrecht, *supra* note 195 (describing impact on industries).

211. *Id.* (describing impact on industries).

212. *Id.* (elaborating on likelihood businesses will be attracted to non-strict liability states).

213. See *id.* (explaining liability question remains unresolved in many circuits).

214. *Id.* (stating only available options to resolve circuit split).

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face challenges both in the Fifth Circuit and other jurisdictions; ultimately, the United States Supreme Court will need to address this, as environmental and animal protection special interest groups continue to fight for stricter enforcement.²¹⁵

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215. See Obrecht, *supra* note 195 (discussing impact of victory for industry in *CITGO*).

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