No. 22AP001468

In the Wisconsin Court of Appeals
DISTRICT IV

ASSOCIATED BUILDERS & CONTRACTORS OF WISCONSIN, INC., COMMERCIAL ASSOCIATION OF REALTORS WISCONSIN, INC., NAIOP WISCONSIN CHAPTER, INC., WISCONSIN BUILDERS ASSOCIATION, AND WISCONSIN REALTORS ASSOCIATION, INC.,
PLAINTIFFS-APPELLANTS,
v.
CITY OF MADISON,
DEFENDANT-RESPONDENT

On Appeal from the Dane County Circuit Court
The Honorable Nia Trammell, Presiding
Case No. 2021CV001729

BRIEF *AMICI CURIAE* OF AMERICAN BIRD CONSERVANCY, MADISON AUDUBON SOCIETY, AND WISCONSIN SOCIETY FOR ORNITHOLOGY IN SUPPORT OF DEFENDANT-RESPONDENT

Under Section (Rule) 809.19(7)

INTRODUCTION

The American Bird Conservancy, Madison Audubon Society, and the Wisconsin Society for Ornithology are nonprofit organizations dedicated to the appreciation, understanding, and conservation of birds and their habitats. We file this brief *amici curiae*, with the consent of the

parties, to bring to the Court's attention the grave environmental context in which the Ordinance at issue in this case was enacted.

We show below (a) that the Earth is undergoing an unparalleled, mass extinction of plant and animal species as a result of human activity, (b) that the United States has lost ***3 billion breeding birds*** in the last 50 years, (c) that anthropomorphic causes account for nearly all of those losses, (d) that collisions with glass windows in buildings kill up to ***1 billion*** birds across the United States every year; (e) that those collisions can be largely avoided using proven building design elements; and (f) that Madison is one of numerous cities in the Country that have enacted legislation designed to drastically reduce the number of bird deaths caused by buildings.

Upholding Madison's Ordinance will not harm the plaintiffs, because it applies to all builders equally, disadvantaging none vis-à-vis any other. Plaintiffs presented no evidence below of any adverse financial impact on any of them. Moreover, the ordinance does not prevent developers from using glass meeting the minimum standards in the uniform building code. They simply must use one of the many solutions available to make the glass better for birds.

Finally, plaintiffs have no standing to speak for their customers – the citizens of Madison – who have spoken through their duly elected officers in favor of the Ordinance and in willing acceptance of any possible increases in costs to save the lives of birds.

Invalidating the Ordinance, on the other hand, will mean the continuation of countless *preventable* bird deaths.

1. The Anthropocene Mass Extinction

Scientists around the world agree that we are now in the Earth's sixth episode of mass extinction.[1] In May 2019, the United Nations-created Intergovernmental Platform on Biodiversity and Ecosystem Services released a Report concluding that we are experiencing an unprecedented mass extinction that is caused by human factors. Nearly 150 authors from 50 nations worked for three years to compile the Report. Representatives of each of the 132 member nations (including the US) signed off on its findings. It concludes that *1,000,000* plant and animal species are on the verge of extinction, a rate of decline that is unparalleled in Earth's history and threatens grave collateral impacts on peoples around the world.[2]

Those dire findings – that the actions of *Homo sapiens* are causing the extinction of other species on Earth at massive levels – mirror the conclusions drawn by scientists who study bird populations.

2. Three Billion Birds Lost.

In less than a single human lifetime, 2.9 billion breeding birds have been lost from the United States and Canada, across every ecosystem and including familiar birds. For example, Dark-eyed Junco and White-throated Sparrow populations have declined by 175 million and 93 million, respectively. This means that we have lost more than a quarter of our birdlife since 1970.

These findings were reported in 2019 in the leading scientific journal, *Science*, by researchers at seven institutions, including American

[1] *See, e.g., The Sixth Extinction: an Unnatural History*, Elizabeth Kolbert (2014).

[2] Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, Summary for policymakers of the global assessment report on biodiversity and ecosystem services (summary for policy makers). IPBES Plenary at its seventh session (IPBES 7, Paris, 2019). Zenodo. https://doi.org/10.5281/zenodo.3553579

Bird Conservancy.[3] This was the first study to assess net population changes across 529 breeding bird species in the United States and Canada. The researchers analyzed birds on a group-by-group basis, allowing them to identify declines among species that use similar habitats. The findings included 48 years of data from multiple independent sources, including the North American Breeding Bird Survey and the Christmas Bird Count. A comprehensive analysis of 11 years of data from 143 NEXRAD radar stations showed a similarly steep decline in the magnitude of bird migration.[4]

The study showed that –

- Forests have lost 1 billion birds since 1970.
- Grassland birds were reduced by 53% — more than 720 million birds.
- Aerial insectivores — birds like swallows, nighthawks, and flycatchers — are down by 32%, or 160 million.
- Coastal shorebirds, already at dangerously low numbers, lost more than one-third of their population.
- The volume of birds in spring migration has dropped by 14% in just the last decade.

Further, in 2020, the National Audubon Society released a scientific study, *Survival By Degrees: 389 Bird Species on the Brink,* showing that

[3] ***SCIENCE***, 19 Sep 2019, Vol 366, Issue 6461, pp. 120-124 ;DOI: 10.1126/science.aaw1313. The participating organizations were the Cornell Lab of Ornithology; American Bird Conservancy; Environment and Climate Change, Canada; the US Geological Survey; Bird Conservancy of the Rockies; and the Smithsonian Conservation Biology Institute.

[4] The Next Generation Weather Radar (NEXRAD) system is a network of 160 high-resolution S-band Doppler weather radars jointly operated by the National Weather Service, the Federal Aviation Administration, and the U.S. Air Force.

two thirds of North American Birds are at risk of extinction because of global warming and other human activities.[5]

This spectacular decline in North American bird populations over the past 50 years has taken place despite the focused and prodigious efforts of over 200 bird conservation and ornithological organizations in the US alone.[6] Obviously more must be done. Individuals, businesses, and municipalities can help turn the tide in the ongoing, essential battle to conserve birds.

3. Human Activity Is the Primary Cause

Habitat loss is generally considered the principal cause of the staggering decline in bird populations,[7] but other anthropocentric causes play a significant role. As the Department of Interior's Fish and Wildlife Service has stated:

> Millions of acres of bird habitat are lost or degraded every year due to development, agriculture, and forestry practices. These rapidly accelerating impacts can be mitigated only through habitat restoration and protection. In addition, millions of birds are directly killed by human-caused sources such as collisions with man-made structures. [8]

4. One Billion Birds Collide with Glass Every Year in the US

According to the Fish and Wildlife Service, "[e]very year, nearly one billion birds die following collisions with glass in the U.S.,"[9] because

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[5] https://www.audubon.org/climate/survivalbydegrees.

[6] The Bird Conservation Alliance has over 200 members comprised of public and federal and state governmental organizations committed to bird conservation. *See https://abcbirds.org/get-involved/bird-conservation-alliance.*

[7] *See* https://abcbirds.org/3-billion-birds.

[8] https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php. *See also https://www.fws.gov/mainefieldoffice/PDFs/mortality-fact-sheet%5B1%5D.pdf* ("Vast numbers of birds are killed due to collisions with human structures and equipment * * *.").

[9] US Fish & Wildlife Service, citing Scott R. Loss, Tom Will, Sara S. Loss, and Peter P. Marra "Bird–building collisions in the United States: Estimates of annual mortality and

birds "don't see glass as a barrier and don't avoid it. They collide with glass when they see natural reflections (clouds, sky, or trees) in the glass, when they see plants through windows, and when they are attracted to landscaping or interior lights. Many birds that seem fine following window collisions can later die from internal injuries."[10]

Locally, the Madison Audubon Society has monitored bird-window collisions during spring and fall bird migration periods since 2018 with its Bird Collision Corps (BCC), a partnership with UW-Madison, Dane County Humane Society's Wildlife Center, American Bird Conservancy, and local businesses. The BCC program documents bird-window strikes at select buildings in and around Madison. Data collected to date suggest high rates of window-caused bird mortality that are consistent with published studies. For example, trained volunteers have regularly monitored 20+ buildings on the UW-Madison campus since 2018, and collectively have found nearly 1500 birds of 96 species that were victims of window strikes, the vast majority proving fatal.[11] Among the most common groups of birds found were warblers, sparrows, thrushes, waxwings, and hummingbirds.

The data generated by the BCC program are being used by partners, businesses, and homeowners to inform pre-construction design and treatment of existing glass that incorporate a variety of bird-safe solutions. For example, after the BCC program identified a connector walkway of a UW-Madison residence hall as a hotspot for bird-window collisions, the glass was retrofitted with bird-friendly dot decals and window collisions have since plummeted by 83%.

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species vulnerability," The Condor 116(1), 8-23, (2 January 2014). https://doi.org/10.1650/CONDOR-13-090.1

[10] https://www.fws.gov/story/threats-birds-collisions-buildings-glass

[11] Exhibit A lists the 96 bird species.

The data from UW-Madison represent just a snapshot, a small fraction of the buildings and window collisions in the Madison area. Indeed, given Madison's unique natural features, including the abundance of water, multiple habitat types, and its location within one of the largest migratory flyways in the world (Mississippi Flyway), the Madison area attracts an incredibly high diversity of bird species. Based on the patterns observed in the BCC program and in other monitoring studies, it is likely that collisions with windows are killing *tens of thousands* of migratory birds every year in Madison.

5. Proven Glass Solutions and Design Strategies Are the Answer

Many existing technologies, familiar to architects and glass companies, can be used to make new bird-friendly glass. Similarly, many existing products and systems that reduce fatal window collisions can be applied to glass that has not yet been installed or to glass already in place in a building. State legislatures, city councils, town boards, and other municipal bodies around the country have accordingly required the use of bird-safe glass in new and refurbished buildings (see below).

These products have been proven to reduce glass collisions. American Bird Conservancy has a glass testing program to which dozens of glass manufacturers from around the world have submitted their products.[12] This program has produced a list of commercially available collision-prevention glass products for new and existing buildings.[13] Glass manufacturers now regularly tout their products as demonstrably bird-friendly[14].

[12] https://abcbirds.org/glass-collisions/research-testing/
[13] https://abcbirds.org/glass-collisions/products-database/
[14] https://www.guardianglass.com/us/en/why-glass/build-with-glass/applications-of-glass/glass-for-facades/bird-friendly-glass. See also https://www.pilkington.com/en/us/products/product-categories/special-applications/pilkington-avisafe#

In addition to bird-friendly glass, many other creative, cost-effective design strategies reduce collisions, including solar shading, avoidance of building features known to pose extreme collision risks, glass reduction, and glare reduction. These strategies often also carry additional benefits such as reduction of energy consumption.

6. Madison Is One of Many Local Jurisdictions Trying to Save Birds' Lives

In 2010, the City of Toronto passed the first bird-friendly building ordinance. In 2011, the City of San Francisco adopted an ordinance and the US Green Building Council (USGBC) created a new system to put bird-friendly building designs into terms that architects can use. In partnership with American Bird Conservancy, New York City Audubon, and the Bird-Safe Building Alliance, USGBC added credit "SSpc55: Bird Collision Deterrence" to USGBC's well-known LEED (Leadership in Energy and Environmental Design) certification program, specifying what developers interested in building sustainable buildings can do to earn the credit. USGBC adopted the credit on the understanding that sustainable buildings shouldn't kill wildlife. This credit is the most popular one in the LEED pilot credit library.[15]

The movement for bird-friendly building requirements at the state and municipal levels has been gaining steam. Twenty-seven different sets of bird-friendly building guidelines exist, with almost all in force in municipalities and states. *See* https://abcbirds.org/glass-collisions/existing-ordinances/. In 2019, New York City enacted the world's best bird-friendly

[15]Thousands of architects have taken American' Bird Conservancy's continuing education bird-friendly building design courses for the annual credits they need to maintain their certification through the American Institute of Architects (AIA).

building ordinance, Local Law 15, requiring all new buildings in the City, and renovations that replace significant amounts of glass, to use ≥90% bird-friendly glass in the first 75 feet above grade. Many other municipal bird-friendly building policies are under development across the United States and Canada.

U.S. Congressman Rep. Mike Quigley (IL) has been the driving force behind the bipartisan Bird-Safe Buildings Act in the US Congress.[16] The bill would require bird-friendly design for all Government Services Administration (GAS) Buildings. In partnership with American Bird Conservancy, GSA has already included bird-friendly building guidelines in its October 2021 "P100: Facilities Standards for the Public Buildings Service."

Conclusion

We have shown above that the Earth is undergoing an unprecedented plant and animal extinction as a result of human activity, including the loss of billions of breeding birds in the US since 1970, and that collisions with glass windows in buildings kill up to a billion birds in America every year. These collisions can be avoided entirely or greatly reduced through the use of proven building design elements, and Madison is one of numerous cities in the country that have enacted legislation designed to take advantage of them and drastically reduce the number of bird deaths. The Ordinance treats all of the Plaintiffs equally – none has provided the Court with any facts about how the Ordinance might cause it financial harm – and the citizens of Madison have decided that whatever increased costs the Ordinance may

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[16] "Legislation To Reduce Bird Collisions Passes The U.S. House Of Representatives." American Bird Conservancy. July 1, 2020. Accessed July 23, 2020. https://abcbirds.org/article/Bird-Safe-Buildings-Act-Passes-US-House-of-Representatives

impose are worth it to save birds' lives. This is the context in which this case comes before the Court.

Finally, we note that believe that there is a strong legal argument that Plaintiffs are wrong in contending that the Madison Ordinance is preempted by Wisconsin Statute §101.02 (7r), relied on by Appellants-Plaintiffs, preempts only *safety* standards for the occupants of public buildings and places of employment. Thus, Chapter 101, governing the Department of Safety and Professional Services, provides in § 101.02(15)(j) Wis. Stats. that the Department –

> shall ascertain, fix and order such reasonable standards or rules for constructing, altering, adding to, repairing, and maintaining public buildings and places of employment ***in order to render them safe.*** (Emphasis added.)

Because the Department can set only standards that "render [buildings] safe," and the Madison Ordinance is not a safety standard within the meaning of Chapter 101, the Ordinance is not preempted.

Respectfully submitted

Law Office of Peter E. McKeever

signed electronically Peter E. McKeever

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2305 words.

Dated this 13th t day of January, 2023.

Electronically signed by: Peter E. McKeever.

Peter E. McKeever

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(7).

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of January, 2023

Electronically signed by: Peter E. McKeever.

Peter E. McKeever

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2022, I caused a copy of this brief to be served upon each of the following persons via email:

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EXHIBIT A

To

BRIEF *AMICI CURIAE*
OF
AMERICAN BIRD CONSERVANCY,
MADISON AUDUBON SOCIETY, AND
WISCONSIN SOCIETY FOR ORNITHOLOGY
IN SUPPORT OF DEFENDANT-RESPONDENT

22AP001468

Window Strike Species List

Bird Collision Corps Program
UW-Madison Campus – Spring 2108 to Fall 2022

American Goldfinch
American Redstart
American Robin
American Woodcock
Baltimore Oriole
Barn Swallow
Belted Kingfisher
Black and White Warbler
Black-billed Cuckoo
Black-capped Chickadee
Black-throated Blue Warbler
Black-throated Green Warbler
Blackburnian Warbler
Blackpoll Warbler
Blue Jay
Blue-headed Vireo
Blue-winged Warbler
Brown Creeper
Brown headed Cowbird
Brown Thrasher
Canada Warbler
Cape May Warbler
Cedar Waxwing
Chestnut-sided Warbler
Clay-colored Sparrow
Common Yellowthroat
Connecticut Warbler
Dark-eyed Junco
Downy Woodpecker
Eastern Meadowlark
Eastern Phoebe
Eastern Towhee
Eastern Wood Pewee
European Starling
Field Sparrow
Fox Sparrow
Golden-crowned Kinglet
Golden-winged Warbler
Grasshopper Sparrow
Gray Catbird
Gray-cheeked Thrush
Hairy Woodpecker
Hermit Thrush
House Finch
House Sparrow
House Wren
Indigo Bunting
Kentucky Warbler
Least Flycatcher
Lincoln's Sparrow
Magnolia Warbler
Mallard
Mourning Dove
Mourning Warbler
Nashville Warbler
Northern Cardinal
Northern Flicker
Northern Parula
Northern Waterthrush
Orange-crowned Warbler
Ovenbird
Palm Warbler

Pine Siskin
Pine Warbler
Red-bellied Woodpecker
Red-breasted Nuthatch
Red-eyed Vireo
Red-tailed Hawk
Red-winged Blackbird
Rock Pigeon
Rock Pigeon (feral)
Rose-breasted Grosbeak
Ruby-crowned Kinglet
Ruby-throated Hummingbird
Savannah Sparrow
Scarlet Tanager
Sharp-shinned Hawk
Song Sparrow
Sora
Swainson's Thrush
Swamp Sparrow
Tennessee Warbler
Tree Swallow
Veery
White-breasted Nuthatch
White-crowned Sparrow
White-throated Sparrow
Wild Turkey
Wilson's Warbler
Winter Wren
Wood Thrush
Yellow Warbler
Yellow-bellied Sapsucker
Yellow-billed Cuckoo
Yellow-rumped Warbler
Yellow-throated Vireo