

STATE OF WISCONSIN

CIRCUIT COURT
Branch 6

DANE COUNTY

**ASSOCIATED BUILDERS & CONTRACTORS
OF WISCONSIN, INC., *et al.*,**

Plaintiffs,

vs.

Case No. 21-CV-1729

CITY OF MADISON,

Defendant.

**NOTICE OF MOTION AND UNOPPOSED MOTION
TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT
BY
AMERICAN BIRD CONSERVANCY, MADISON AUDUBON, AND WISCONSIN
SOCIETY FOR ORNITHOLOGY**

TO: Associated Builders &
Contractors Of Wisconsin, Inc

Commercial Association Of
Realtors Wisconsin, Inc.

NAIOP Wisconsin Chapter, Inc.

Wisconsin Builders Association

Wisconsin Realtor Association,
Inc.

All c/o Atty. Rick Eisenberg

Atty. Lucas Vebber

Atty. Anthony F. LoCoco

330 East Kilbourn Avenue, # 725

Milwaukee, WI 53202

City of Madison

c/o Michael Haas, City Attorney

Kate Smith, Assistant City

Attorney

Office of the City Attorney

City-County Building, room 401

210 Martin Luther King, Jr.,

Boulevard

Madison, WI 53703-3345

Please take notice that, pursuant to Wis. Stat. § 802.01(2), American Bird Conservancy, Madison Audubon and Wisconsin Society for Ornithology (collectively (“*Amici*”) hereby move the Court for leave to file the attached brief as *amici curiae* in the above-referenced matter. The motion will be heard at a date and time to be set by the Court.

In support of this motion, *Amici* respectfully submit the following:

1. A circuit court may grant a nonparty permission to participate in a case as *amicus curiae*. See *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶¶ 32 & 113, 307 Wis. 2d 1, 745 N.W.2d 1. A court may hear from an *amicus curiae* in order to “be informed by persons not parties to a legal action, who are nonetheless particularly informed or interested in the outcome (or at least the law being declared).” *Id.* ¶ 32 & n.20 (quoting Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L.J. 1855, 2012 (1985)). “Briefs by *amicus curiae* can provide assistance to a court by presenting an argument or citing authority not found in the parties’ briefs or by providing important technical or background information which the parties have not supplied.” *Id.* (citing Joseph D. Kearney et al., *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Penn. L. Rev. 743, 745 (2000)).

2. Although the Wisconsin rules of civil procedure do not provide a specific means for filing an *amicus* brief in circuit court, the Wisconsin rules of appellate procedure do: “[a] person not a party may by motion request permission to file a brief. The motion shall identify the interest of the person and state why a brief filed by that person is desirable.” Wis. Stat. § 809.19(7)(a).

3. American Bird Conservancy is a national membership-based nonprofit corporation dedicated to conserving wild birds and their habitats throughout the Americas. The

mission has guided the organization for more than 25 years. ABC works to halt the extinction of birds, conserve habitats, and eliminate threats to birds. It is the leading organization in studying the impact of window strikes on bird mortality and researching alternatives, including studying the effectiveness of bird-safe window and door glass.

4. Madison Audubon Society is a chapter of the National Audubon and has more than 3500 members whom it represents in 10 southern Wisconsin counties. It is a regional leader in conservation of birds in the Midwest and uses the best available science to inform its programs and actions in habitat restoration, research, advocacy, and citizen science. The Madison Audubon “Bird Collision Corps” (BCC) citizen-science project was launched in 2018 to monitor bird-window collisions in Madison. BCC partners include UW-Madison, Dane County Humane Society’s Wildlife Center, the American Bird Conservancy, and local businesses. Data collected to date suggest high rates of window-caused bird mortality that are consistent with published studies. These data are also being used by local partners, businesses, and homeowners to inform pre-construction design and treatment of existing glass that incorporate a variety of bird-safe solutions.

5. The Wisconsin Society for Ornithology is a statewide nonprofit organization with approximately 1150 members from throughout Wisconsin. Established in 1939 it is devoted to the enjoyment, study and conservation of Wisconsin’s birds. Among its many activities to promote the study and conservation of birds, it coordinates with avian experts in academia and public and private agencies and organizations and publishes a quarterly scientific journal, *The Passenger Pigeon*. The Society has an active bird conservation agenda, including the promotion of bird-safe window and door glass.

6. *Amici* are well informed about the issues presented in this case and interested in the outcome. In their complaint Plaintiffs ask the Court to declare that Madison’s “Bird-Safe Glass Requirements” ordinance, Madison General Ordinance § 28.129, is unlawful and void, and enjoin the city from enforcing the ordinance. Doing so will eliminate an important tool that is proven to protect birds and will contribute to the increasing decline in bird populations.

7. *Amici* can provide relevant legal analysis to this Court given their interest in the issues presented and their expertise regarding the legal and scientific underpinnings of Defendants’ actions and Plaintiffs’ challenge thereto.

8. *Amici* seek to file an *amicus* brief to inform the Court about the statutory, regulatory, and scientific framework surrounding the precipitous decline in bird populations and the important role bird-safe glass has in protecting birds from mortality as a result of striking windows and to present the Court with the potential consequences of invalidating the ordinance.

9. *Amici* all have active bird conservation and protection initiatives and recognize the importance of bird-safe glass in preventing bird collisions which kill or injure birds.

10. Counsel for *Amici* has conferred with counsel for Plaintiffs and Defendants regarding their position on this motion. None of the parties to this action oppose the motion.

WHEREFORE, American Bird Conservancy, Madison Audubon, and Wisconsin Society for Ornithology respectfully request that the Court grant their motion for leave to file the *amicus curiae* brief attached hereto as **Exhibit A**.

Respectfully submitted this 1st day of April, 2022.

Law Office of Peter E. McKeever

signed electronically Peter E. McKeever
Peter E. McKeever, SBN 1015142

*Attorney for American Bird Conservancy,
Madison Audubon, and Wisconsin Society for
Ornithology, Amici Curiae*

William F. Sheehan
Vice President and General Counsel
American Bird Conservancy
4301 Connecticut Avenue, N.W.
Washington, D.C. 20008
wsheehan@abcbirds.org
301 922 8616

Law Office of Peter E. McKeever
6302 Southern Circle
Monona, WI 53716
608-223-1275
peter@petermckeeper.net

ASSOCIATED BUILDERS & CONTRACTORS
OF WISCONSIN, INC., *et al.*,

Plaintiffs,

vs.

Case No. 21-CV-1729

CITY OF MADISON,

Defendant.

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

The American Bird Conservancy, Madison Audubon Society, and the Wisconsin Society for Ornithology hereby file this brief *amici curiae* to bring to the Court's attention the grave environmental context in which the Ordinance at issue in this case was enacted.¹ 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 US alone 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 America every year; (e) that those collisions can be largely avoided using proven building design

¹ We are authorized to state that both parties have consented to the filing of this brief.

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, despite their gripes about losing money, because it applies to all builders equally, disadvantaging none vis-à-vis any other. 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.² In May 2019, the United Nations-created Intergovernmental Platform on Biodiversity and Ecosystem Services (IPES) 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

² See, e.g., *The Sixth Extinction: an Unnatural History*, Elizabeth Kolbert (2014).

unparalleled in Earth's history and threatens grave collateral impacts on peoples around the world.³

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 Bird Conservancy.⁴ 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

³ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. (2019). 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>

⁴ *SCIENCE*, 19 Sep 2019, Vol 366, Issue 6461, pp. 120-124; DOI: [10.1126/science.aaw1313](https://doi.org/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.

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.⁵

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.

It gets worse. In 2020, the National Audubon Society released a scientific study, *Survival By Degrees: 389 Bird Species on the Brink*, showing that two thirds of North American Birds are at risk of extinction because of global warming and other human activities.⁶

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.⁷ Obviously more must be done. Individuals, businesses, and municipalities can help turn the tide in the ongoing battle to conserve birds.

⁵ 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.

⁶ <https://www.audubon.org/climate/survivalbydegrees>.

⁷ 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>.

3. Human Activity Is the Primary Cause

Habitat loss is generally considered the principal cause of the staggering decline in bird populations,⁸ 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.⁹

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.,”¹⁰ because 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.”¹¹

⁸ See <https://abcbirds.org/3-billion-birds>.

⁹ <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>. See also <https://www.fws.gov/mainfieldoffice/PDFs/mortality-fact-sheet%5B1%5D.pdf> (“Vast numbers of birds are killed due to collisions with human structures and equipment * * *.”).

¹⁰ 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 species vulnerability," *The Condor* 116(1), 8-23, (2 January 2014). <https://doi.org/10.1650/CONDOR-13-090.1>

¹¹ <https://www.fws.gov/story/threats-birds-collisions-buildings-glass>

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, finding nearly 1000 birds of 79 species that were victims of window strikes, the vast majority proving fatal.¹² 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%.

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

¹² Appendix A lists the 79 bird species.

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.¹³ This program has produced a list of commercially available collision-prevention glass products for new and existing buildings.¹⁴ Glass manufacturers now regularly tout their products as demonstrably bird-friendly. *See, e.g.,* <https://www.guardianglass.com/us/en/why-glass/build-with-glass/applications-of-glass/glass-for-facades/bird-friendly-glass>; <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.

¹³ <https://abcbirds.org/glass-collisions/research-testing/>

¹⁴ <https://abcbirds.org/glass-collisions/products-database/>

6. Madison Is One of Many 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 building ordinance, Local Law 15, requiring all new buildings in the City, and renovations that replace significant amounts of glass, to use $\geq 90\%$ 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.

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).

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

Finally, we 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). That provision preempts only *safety* standards for the occupants of public buildings and places of

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>

employment. Chapter 101, governing the Department of Safety and Professional Services, provides in section 101.02(15)(j) 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.)

That language does not give the Department *carte blanche* to set any kind of building standards it wants, but instead only standards that “render [buildings] safe.” Because the Madison Ordinance is not a safety ordinance within the meaning of Chapter 101, it is not preempted by section 101.02(7r).

Respectfully submitted,

Law Office of Peter E. McKeever

signed electronically Peter E. McKeever

Peter E. McKeever, SBN 1015142

*Attorney for American Bird Conservancy,
Wisconsin Society for Ornithology, and
Madison Audubon, Amici Curiae*

William F. Sheehan

Vice President and General Counsel

American Bird Conservancy

4301 Connecticut Avenue, N.W.

Washington, D.C. 20008

wsheehan@abcbirds.org

301 922 8616

Attorney for American Bird Conservancy

Law Office of Peter E. McKeever

6302 Southern Circle

Monona, WI 53716

608-223-1275

peter@petermckeever.net

April 1, 2022