No. 17-1636

In the Supreme Court of the United States

CALIFORNIA SEA URCHIN COMMISSION, ET AL.,
PETITIONERS

v.

SUSAN COMBS, ACTING ASSISTANT SECRETARY
FOR FISH, WILDLIFE, AND PARKS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The southern sea otter, or California sea otter, is a threatened species protected by the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.* In support of conservation efforts by the U.S. Fish and Wildlife Service (Service), Congress also enacted species-specific legislation providing that the Service "may develop and implement * * * a plan for the relocation and management of a population of California sea otters from the existing range of the parent population to another location," and articulating several "specifications" for any plan that the Service chose to adopt. Act of Nov. 7, 1986, Pub. L. No. 99-625, § 1(b), 100 Stat. 3500 (capitalization omitted). The Service decided to exercise this discretionary authority and, in 1987, promulgated regulations to create an experimental population by relocating sea otters to San Nicolas Island, California. In 2012, the Service determined that the plan had failed to achieve its purposes and repealed the implementing regulations.

The question presented is whether the court of appeals correctly upheld the Service's determination that it had the statutory authority to repeal the implementing regulations after determining that the plan had failed to achieve its purposes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 883 F.3d 1173. The opinion of the district court in petitioners' first case (Pet. App. C1-C19) is reported at 239 F. Supp. 3d 1200. The opinion of the district court in petitioners' second case (Pet. App. E1-E25) is not published in the Federal Supplement but is available at 2015 WL 5737899.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2018. The petition for a writ of certiorari was filed on May 30, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The southern sea otter, also known as the California sea otter, historically inhabited waters off the western coast of the United States. After centuries of intense hunting, by the early 1900s, only a few dozen sea otters remained in existence. 15-56672 C.A. E.R. 95. By the 1970s, the population gradually increased to between 1000 and 2000. 42 Fed. Reg. 2965, 2966 (Jan. 14, 1977). Nonetheless, the sea otter remained in danger of extinction because of its small population size and its vulnerability to potential oil spills by tankers traversing the California coast. *Id.* at 2966-2967.[1]

In the 1970s, Congress enacted several statutes establishing protections for the sea otter and related species. The Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, directs the Secretary of the Interior to identify and list species that are "endangered" or "threatened." 16 U.S.C. 1533(a)(1).[2] The ESA directs the U.S. Fish and Wildlife Service (Service) to "develop and implement * * * 'recovery plans'[] for the conservation and survival of endangered species and threatened species." 16 U.S.C. 1533(f)(1). The ESA and implementing regulations also generally make it unlawful to "take" a protected species, 16 U.S.C. 1538(a)(1)(B)-(C); see 50 C.F.R. 17.21(c), 17.31(a), meaning to "harass, harm, pursue, hunt, shoot,

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[1] Unlike most marine mammals, sea otters do not have blubber to provide insulation, but instead depend upon dense, water-resistant fur. Oil contamination can destroy the insulating properties of sea-otter fur, leading to hypothermia and death. 15-56672 C.A. E.R. 134.

[2] An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. 1532(6), while a "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range," 16 U.S.C. 1532(20).

wound, kill, trap, capture, or collect [the species], or to attempt to engage in any such conduct," 16 U.S.C. 1532(19). In 1977, the Service listed the southern sea otter as a threatened species under the ESA. See 42 Fed. Reg. at 2966.

In addition, the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361 *et seq.*, establishes similar protections for marine mammals, including sea otters, without regard to whether they are endangered or threatened. See 16 U.S.C. 1362(6) (defining "marine mammal"). In enacting the MMPA, Congress found that marine mammals "should not be permitted to diminish below their optimum sustainable population" and that "[f]urther measures should be immediately taken to replenish any species or population stock which has already diminished below that population." 16 U.S.C. 1361(2). Similar to the ESA, the MMPA imposes prohibitions against the "tak-[ing]" of marine mammals. 16 U.S.C. 1371, 1372(a); see 16 U.S.C. 1362(13) (defining "take").

In the early 1980s, as part of its recovery planning efforts, the Service concluded that it would be desirable to establish a sea otter colony that was sufficiently distant from the existing ("parent") population to ensure that "an environmental catastrophe like an oil spill would not endanger the entire species." Pet. App. A5. The Service identified San Nicolas Island, an island in the Channel Islands off the coast of Ventura County, California, as a suitable site for the experimental population. 51 Fed. Reg. 29,362, 29,363 (Aug. 15, 1986). The Service proposed regulations that would implement this plan, see *id.* at 29,380-

29,383, as well as "criteria * * * to describe the circumstances in which the Service would consider the translocation to be a failure," *id.* at 29,371.[3]

The Service contemplated, however, that further legislative authorization would likely be required. 51 Fed. Reg. at 29,367-29,368. The ESA authorized the Service to "permit, under prescribed terms and conditions, any acts necessary for the establishment and maintenance of an experimental population" of an endangered or threatened species. *Id.* at 29,367; see 16 U.S.C. 1539(j)(1) and (2)(A). The MMPA, however, contained no express provision allowing the Service the flexibility to take all steps necessary to facilitate the establishment of an experimental population. "Concerned with whether it had sufficient authority to carry out the plan, the Service asked Congress to extend its powers" to ensure that it would be able to carry out an experimental relocation. Pet. App. A5.

Congress responded by passing the Act of November 7, 1986 (P.L. 99-625), Pub. L. No. 99-625, 100 Stat. 3500. P.L. 99-625 provides that the Service "*may* develop and implement * * * a plan for the relocation and management of a population of California sea otters from the existing range of the parent population to another location." § 1(b), 100 Stat. 3500 (emphasis added). It also exempts the Service, state agencies, and their authorized agents from any liability under the ESA or MMPA arising from the relocation or management of sea otters under such a plan. § 1(f), 100 Stat. 3501. The statute directs that any such plan "must be developed by regulation and administered by the Service in cooperation with the appropriate

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[3] Petitioner California Abalone Association submitted a comment on the proposed regulations stating that it was "pleased to see * * * criteria for failed translocation" included in the proposed rule. 15-56672 C.A. Supp. E.R. 7.

State agency," and specifies certain features that a plan "shall include" if undertaken. § 1(b), 100 Stat. 3500.

As relevant here, P.L. 99-625 directs that any plan include two geographical "zone[s]": a "translocation zone * * * to which the experimental population will be relocated," § 1(b)(3), 100 Stat. 3500, and a surrounding "management zone" that "facilitate[s] the management of sea otters and the containment of the experimental population within the translocation zone," § 1(b)(4), 100 Stat. 3500-3501. Congress provided that within such a "management zone," the "Service shall use all feasible nonlethal means and measures to capture any sea otter * * * and return it to either the translocation zone or to the range of the parent population." *Ibid.* Congress did not specify a maximum or minimum size for such a zone, but did direct that the management zone "[must] not include the existing range of the parent population or adjacent range where expansion is necessary for the recovery of the species." § 1(b)(4)(B), 100 Stat. 3500.

Congress contemplated that, if the Service did choose to implement a plan, dispersal by sea otters from the experimental population into the management zone could lead to "conflict with other fishery resources." P.L. 99-625, § 1(b)(4), 100 Stat. 3501. Nonetheless, as enacted, P.L. 99-625 generally retains a prohibition against the taking of sea otters within the management zone. See § 1(c)(2), 100 Stat. 3501 (providing that "Section 9 of the [ESA] applies to members of the experimental population" while "within the management zone"). The statute provides, however, that "any incidental taking of such a member during the course of an otherwise lawful activity within the management zone[] may not be treated as a violation of the [ESA] or the [MMPA]." *Ibid.*

b. The Service chose to exercise its discretionary authority under P.L. 99-625 to develop and implement a plan for an experimental population of southern sea otters. In 1987, the Service issued a final rule promulgating regulations governing the relocation-and-management plan. 52 Fed. Reg. 29,754 (Aug. 11, 1987). The Service's rule identified San Nicolas Island as the translocation zone for the experimental population, and it proposed to translocate up to 250 sea otters to the island. *Id.* at 29,765-29,766. With respect to the management zone, the Service designated the entire southern coast of California from Point Conception (northwest of Santa Barbara) to the border with Mexico. See *id.* at 29,769 ("The management zone * * * consists of all waters, islands, islets, and land areas seaward of mean high tide subject to the jurisdiction of the United States * * * located south of Point Conception * * * except for any area within the translocation zone.").

Reflecting the experimental nature of the plan that Congress had authorized, the Service also established a set of "five specific 'failure conditions.'" Pet. App. A9 (citation omitted); cf. 50 C.F.R. 17.81(c)(4) (requiring "[a] process for periodic review and evaluation of the success or failure" of experimental populations designated under the ESA). The Service's regulation provided that the translocation of sea otters "would generally be considered to have failed" if "any one of these criteria" was satisfied, in which case "t[he] rulemaking will be amended to terminate" the plan. 52 Fed. Reg. at 29,772. Additionally, in that scenario, "all otters remaining within the translocation zone" would be captured and returned to the parent population, and "all reasonable efforts" would be made to "remove all otters that were still within the management zone at the time of the decision to terminate" the plan. *Ibid.*

Over the course of implementing and administering the plan, the Service encountered several problems. First, as the Service subsequently explained, capturing sea otters from the existing population and transferring them to San Nicolas Island proved more dangerous to sea otters than expected. 77 Fed. Reg. 75,266, 75,269 (Dec. 19, 2012). Of the 252 sea otters that were captured for possible experimental release, only 140 were deemed suitable for translocation. *Id.* at 75,269. Six animals "died of stress-related conditions" before they could be transferred, and others died after release at San Nicolas Island. *Ibid.* After three years of transfer efforts, in 1991, the Service "stopped translocating sea otters to San Nicolas Island due to high rates of dispersal and poor survival." *Ibid.*

Second, removing sea otters from the management zone also proved more hazardous to the animals than expected. Although the Service had originally believed that "effective containment [could be] carried out" using "nonlethal methods," 52 Fed. Reg. at 29,757, it later became "concerned that sea otters were dying as a result of [its] containment efforts" in the management zone, 77 Fed. Reg. at 75,269, and moreover, that its efforts had also "proven to be less effective and more labor-intensive than originally predicted," *ibid.* In 1993, the Service suspended all efforts to capture sea otters within the management zone pending further evaluation. *Ibid.*; cf. P.L. 99-625, § 1(b)(4), 100 Stat. 3501 (requiring Service to remove sea otters from management zone to the extent "feasible, nonlethal means" were available). The Service's state-agency counterpart later notified the Service that it would "no longer be able to assist" with "capturing sea otters in the management zone." 77 Fed. Reg. at 75,269.

Third, although the Service had expected "dispersal [of sea otters] away from San Nicolas Island * * * to be negligible," 52 Fed. Reg. at 29,768, many of the translocated sea otters in fact "swam back to the parent population," 77 Fed. Reg. at 75,269; see also *id.* at 75,267 (as of 2012, it is "now well established that sea otters can return rapidly to areas from which they have been removed"). Indeed, through a combination of mortality and emigration, three years into the experiment, only 14 "independent (non-pup) southern sea otters" were believed to remain at San Nicolas Island, or only "10 percent" of the number of sea otters that had been transferred there. *Ibid.*

Finally, although P.L. 99-625 specified that the management zone must not include "the existing range of the parent population or adjacent range where expansion is necessary for the recovery of the species," P.L. 99-625, § 1(b)(4)(B), 100 Stat. 3500, it soon became apparent that the parent population was naturally migrating into that zone. "In 1998, a group of approximately 100 southern sea otters moved from the parent range into the northern end of the management zone, inaugurating a pattern of seasonal movements of large numbers of sea otters into and out of the management zone." 77 Fed. Reg. at 75,269. That southward migration of the parent population had occurred even though its population was *declining*, not growing. See *ibid.* (noting that "rangewide counts * * * indicated a decline of approximately 10 percent between 1995 and 1998"). After consulting with a "team of biologists with expertise pertinent to southern sea otter recovery," the Service determined that it should not attempt to capture and move any of the sea otters migrating into the management zone, "because moving large groups of southern sea otters and releasing them within the parent range would be disruptive to the social structure of the

parent population," *id.* at 75,270, and would "likely jeopardize the continued existence and impede the recovery of the species," *id.* at 75,272; see *ibid.* (summarizing findings of 2000 revised biological opinion); *id.* at 75,286 (finding that management zone's "boundaries, as currently determined, [were] not in compliance with" P.L. 99-625, § 1(b)(4)(B), 100 Stat. 3500).

In 2001, the Service announced that it intended to undertake a "full and final evaluation" of the relocation-and-management program. 77 Fed. Reg. at 75,272. In 2003, the Service issued a revised recovery plan that recommended "declar[ing] the translocation program a failure and discontinu[ing] maintenance of a 'no-otter' management zone." *Id.* at 75,267; see *id.* at 75,270. After the Service did not promptly rescind its regulations, in 2009, several environmental groups brought suit against the Service, and two of the petitioners (California Sea Urchin Commission and California Abalone Association) intervened as defendants. That litigation was resolved through a consent decree, agreed to by all parties (including the two petitioner defendants), that committed the Service to making a further "determination as to whether the translocation program has failed" and, if so, to conduct a rulemaking to "terminate the program." 09-cv-4610 Docket entry No. 67, at 4 (N.D. Cal. Nov. 23, 2010).

Consistent with the consent decree, in 2012, the Service issued a final rule determining that the relocation plan had failed and rescinding its implementing regulations. See 77 Fed. Reg. at 75,266-75,268. The Service noted that the plan had met "failure criterion 2," *id.* at 75,267: that is, "within three years from the initial transplant [*i.e.*, as of 1991], fewer than 25 otters remain[ed] in the translocation zone and the reason for emigration or

mortality [could not] be identified and/or remedied," 52 Fed. Reg. at 29,784.

The Service also identified five further reasons why it considered the program a failure: (1) even as of 2012, the population of sea otters at San Nicolas Island "remain[ed] small, and its ability to become established and persist is uncertain"[4]; (2) in light of further study of environmental risks, the Service determined that even a well-established colony at San Nicolas Island would "not provide an adequate safeguard should the mainland southern sea otter population be adversely affected by a catastrophic event"; (3) any further "attempts to limit natural range expansion of southern sea otters" into the management zone would "disrupt seasonal patterns of movement and hinder recovery" of the species; (4) "capturing and moving sea otters" out of the management zone "ha[d] proven to be ineffective" given the difficulties of sea otter capture, the "ability of sea otters to return rapidly" upon release, and "the elevated mortality associated with the holding, transport, and release of sea otters"; and (5) the Service's "recovery strategy for the southern sea otter has changed since the original recovery plan was released in 1982, in part because of [the points] above." 77 Fed. Reg. at 75,267.

The Service noted that its rescission of the regulations would eliminate all special legal rules associated with the program, including "any exemptions from incidental take liability," Pet. App. A9, and any "obligation to remove southern sea otters in perpetuity from an 'otter-free' management zone," 77 Fed. Reg. at 75,266, and thus returned to the generally applicable ESA and MMPA regimes. The Service also determined that, upon termination of the

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[4] Petitioners' assertion that "[t]he Service declined to consider the [San Nicolas] population's subsequent growth or the size of the population in 2012," Pet. 13-14, is thus erroneous. See also Pet. App. A9.

plan, it would be inappropriate to seek to remove sea otters from San Nicolas Island or the management zone. The Service acknowledged that its 1987 rule had provided that, in the event of failure, efforts would be made to capture "otters remaining within the translocation zone * * * [and] within the management zone" and to release them "into the range of the parent population." 52 Fed. Reg. at 29,784. The Service, found, however, that "[t]he attempted removal of sea otters from San Nicolas Island or the management zone, even over the short term, could result in increased mortality of the removed sea otters and temporarily disrupt behavior throughout the range of the species." 77 Fed. Reg. at 75,267. The Service also reasoned that "attempting these removals would be not only harmful but likely futile," insofar as "sea otters can return rapidly to areas from which they have been removed." *Ibid.* The Service therefore rescinded its regulations in toto, including the provision that contemplated the capture and removal of sea otters upon the plan's termination. *Ibid.*

2. Petitioners are four associations representing the interests of commercial fishermen who operate in coastal California waters, including within the former management zone. Pet. 14-15; Pet. App. C1.

a. In 2013, petitioners filed a suit in the Central District of California challenging the Service's decision to terminate the relocation-and-management plan and to rescind its implementing regulations. Pet. App. A10. The district court initially dismissed the suit as untimely, but the court of appeals reversed. 828 F.3d 1046. On remand, the Service moved for summary judgment, arguing both that petitioners lacked standing and that its rescission of the regulations was lawful.

The district court granted the Service's motion. Pet. App. C1-C19; see *id.* at D1-D2 (judgment). At the threshold, the court addressed petitioners' "two theories of standing." *Id.* at C4. The court rejected petitioners' assertion of standing based on an alleged "appreciable risk of incurring [take] liability as a result of the challenged regulation," *ibid.*, explaining that petitioners had failed to offer evidence showing that "they engage in activities that are likely to result in liability" under the ESA or MMPA, *id.* at C5-C6; see *id.* at C4 (noting that "the plaintiff must establish standing 'with the manner and degree of evidence required at' the relevant stage of the litigation") (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). But the court found standing based on petitioners' separate assertion that sea otters, if not removed from the management zone, would "significantly reduce[] shellfish populations along the coastline," thereby injuring the business interests of petitioners' members. *Id.* at C6-C7 (citation omitted). And the court reasoned that a favorable judgment on the merits could potentially redress that injury because—although sea otters had been allowed to migrate into and inhabit the management zone since 1993—reinstatement of the regulations would in principle require the Service "to relocate otters" from the management zone if the Service ever "identified a 'feasible, nonlethal' method for doing so," although that scenario was "unlikely." *Id.* at C7.

On the merits, the district court upheld the Service's determination that it possessed the statutory authority to terminate its experimental plan. The court rejected petitioners' argument that P.L. 99-625 unambiguously required the Service to maintain the relocation-and-management plan permanently, explaining that the statutory text "neither requires the [Service] to develop the

Plan nor prohibits the [Service] from repealing the Plan after it is developed." Pet. App. C14. Concluding that Congress did not "sp[eak] directly to the question at hand," the court found the Service's determination that it possessed authority to end the plan was "reasonable" and consistent with the statute's text, structure, and legislative history. *Id.* at C15; see *id.* at C15-C18.

b. While that litigation was pending, in 2014, petitioners filed an administrative petition requesting that the Service revoke its 2012 final rule and thereby reinstate the 1987 regulations. See Pet. App. E7. When that effort proved unsuccessful, three of the petitioners filed suit in the Central District of California arguing that the Service had acted unlawfully in denying their petition, advancing in substance the same arguments made in the first suit.[5] See *id.* at E7, E16-E25. The Service moved for summary judgment. *Id.* at E2.

The district court in that separate suit granted summary judgment for the Service on both standing and merits grounds. Pet. App. E1-E25. The court found that petitioners had failed to establish standing based on their "fear of prosecution for take of otter," *id.* at E14 (quoting Compl. ¶ 68), because they failed to offer "any evidence" demonstrating that they faced a genuine risk of prosecution for incidental taking of sea otters, *id.* at E15. The court also found that petitioners could not establish standing based on their assertion that sea otters in the management zone were "consum[ing] * * * large amounts of shellfish," explaining that petitioners' suit would not redress that injury. *Id.* at E13. As the court observed, petitioners had expressly disclaimed any effort to "require the Service to resume capturing and removing otters that

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[5] Petitioner California Lobster and Trap Fishermen's Association did not join as a plaintiff in this second suit. See Pet. ii n.*.

wander into the management zone"; instead, they sought only to avoid liability "for accidentally harming[] [or] harassing" sea otters in that zone. *Id.* at E13-E14 (quoting 14-cv-8499 Docket entry No. 44, at 1, 17 (C.D. Cal. Aug. 5, 2015)). Thus, "[petitioners] conce[ded] that any alleged injuries that might result from the diminution of the shellfish stocks caused by the sea otters' consumption * * * will not be redressed by their lawsuit." *Id.* at E14.

"Even assuming that [petitioners] have standing," the district court determined, their claims would fail on the merits. Pet. App. E16. Noting that "P.L. 99-625 uses purely discretionary language authorizing the program," the court concluded that "the plain language of the statute" gave the Service "the discretion to both commence and cease implementation of the program." *Id.* at E16-E18. The court also stated that "[e]ven if there was any ambiguity in the statute," it would sustain the Service's interpretation as a "permissible construction." *Id.* at E18 (citation omitted); see *id.* at E18-E25 (analyzing statutory text, context, purpose, and legislative history).

3. Petitioners appealed both judgments, and the court of appeals unanimously affirmed as to "both district courts' conclusions that the Service acted lawfully in terminating the southern sea otter relocation program." Pet. App. A22; see *id.* at A1-A22.

At the threshold, the court of appeals found that petitioners had established standing. Pet. App. A11-A15. It agreed with both district courts that petitioners could not establish standing based on their unsubstantiated claims of an "increased risk of liability because of the elimination of exemptions for incidental takes in the management zone." *Id.* at A12. The court of appeals found, however, that petitioners were injured by "sea otter predation of

shellfish." *Id.* at A14. And although the court acknowledged the Service's argument that a judgment in petitioners' favor would not redress their injury—inasmuch as the Service would still be under no immediate obligation to remove sea otters—the court nonetheless concluded that "[w]here there are legal impediments to the recovery sought, it is enough for standing that the relief sought will remove some of those legal roadblocks, even if others may remain." *Id.* at A14-A15.

Turning to the merits, the court of appeals noted that "[a]ll parties agree" that the statutory question "should be assessed under the two-step * * * analysis" set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. A16. Under that framework, if Congress has "directly spoken to the precise question at issue," then the court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. If, however, "the statute is silent or ambiguous with respect to the specific issue," the court upholds the agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843.

Applying that framework, the court of appeals rejected petitioners' argument that Congress had foreclosed the Service from ever terminating a translocation plan if it exercised its discretion to implement one. Pet. App. A16-A17. The court explained that although petitioners had identified some "scattered mandatory language in the statute" that created specifications for any plan that might be implemented, *id.* at A16, the statute did not direct the Service to implement a translocation plan in the first instance, and it neither expressly obligated it to "operate [one] in perpetuity" nor expressly granted the Service authority to terminate the program, *id.* at A17. Thus concluding that "the statute is silent or ambiguous with

respect to the specific issue" whether the Service had the authority to terminate the program, the court proceeded to consider whether the agency's action was "based on a permissible construction of the statute." *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

The court of appeals "h[e]ld that it is reasonable to interpret the statute as implicitly giving the Service authority to terminate the program when it determines that the purposes of the statute would no longer be served, or when its continuation would be at odds with the goals of the ESA or the MMPA." Pet. App. A18. Noting that P.L. 99-625 repeatedly refers to the ESA and incorporates its requirements, the court found it "reasonable for the Service to interpret the provisions of [P.L.] 99-625 as authorizing it to act in harmony with the goals of the ESA," including by "[t]erminating the failed translocation program" once it had been determined to undermine the ESA's goals. *Ibid.* Petitioners' competing reading of the statute, by contrast, would "require the [translocation] program to continue even if the Service determined that it was counter-productive." *Ibid.* The court also noted that P.L. 99-625 "was not intended to limit expansion of the northern parent population," *ibid.*, making it "reasonable for the Service to end the program once it has determined that * * * continuing the program now would pose a threat to" that population, *id.* at A19. The court also rejected as "unconvincing" petitioners' "constitutional avoidance" theory that permitting the Service to discontinue the failed program would likely result in an impermissible delegation of legislative authority to the Service. *Id.* at A20; see *id.* at A20-A22.

The court of appeals nonetheless emphasized that it did not intend to establish a "broad principle that if the implementation of a regulation is discretionary, then the

agency always has discretion to end the regulation at any time and for any reason." Pet. App. A19. Instead, the court explained that it was "hold[ing] only that in the circumstances here, where the agency has discretion to implement an experimental program, [the agency] can reasonably interpret the statute to allow it to terminate that program if the statute's purpose is no longer being served" or, indeed, if "the agency concludes that continuing the program" would actively "undermine the stated purpose of the statute that authorizes it." *Id.* at A19-A20.

ARGUMENT

Petitioners urge (Pet. 18-37) this Court to grant review to address whether federal agencies should receive deference for assertions of regulatory power that rest only upon statutory "silence." But this case does not present that question. The Service did not purport to exercise authority to regulate activities about which Congress was silent. Rather, the Service discontinued an experimental program that Congress had not only expressly authorized the Service to undertake through the issuance of regulations, but also expressly made discretionary. The court of appeals' determination that the Service acted lawfully in terminating this discretionary program was correct and does not conflict with any decision of this Court or another court of appeals. Moreover, threshold justiciability problems would likely preclude this Court's review of the merits in any event, particularly insofar as petitioners expressly disclaimed the factual predicate upon which their theory of redressability now rests. Further review is not warranted.

1. As an initial matter, for the reasons set forth below, by far the most natural reading of P.L. 99-625—indeed, the one that the Service views the plain language of the

statute to require—is that the Secretary had the discretionary authority to terminate the relocation plan when it determined that the plan was no longer serving its species-protective purpose. Deference to the agency's interpretation therefore is not required.

In any event, "[a]ll parties agree[d]" below, Pet. App. A16, that petitioners' claim is properly adjudicated under the interpretive framework set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under that framework, "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Id.* at 842. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, * * * the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If, however, the statute is "silent or ambiguous with respect to the specific issue," the court considers whether the agency interpretation is "based on a permissible construction of the statute." *Id.* at 843. If the agency's resolution of the question is reasonable, the court sustains that interpretation.

a. As this Court has recognized, the fact that a statute is arguably "silent" about a matter in dispute does not categorically have the same import in all cases under *Chevron*. Instead, as with other interpretive questions, the court must consider the relevant statutory text and surrounding context. See *Chevron*, 467 U.S. at 843 n.9 (courts use "traditional tools of statutory construction" in determining whether statute is silent or ambiguous); cf. *Holloway* v. *United States*, 526 U.S. 1, 7 (1999) ("[T]he meaning of statutory language, plain or not, depends on context.") (citation omitted).

In some instances, a statute's failure to address a particular activity may properly be understood as reflecting that Congress did not intend the agency to regulate that activity. Because "an agency literally has no power to act * * * unless and until Congress confers power upon it," *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986), "sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion," *Entergy Corp.* v. *Riverkeeper, Inc.,* 556 U.S. 208, 223 (2009). See, *e.g.*, *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (concluding that absence in Food, Drug, and Cosmetic Act of authorization to regulate tobacco precluded FDA from regulating tobacco products).

In other cases, however, a statute's failure to expressly resolve a question of agency practice is better understood as a "refusal to tie the agency's hands." *Entergy*, 556 U.S. at 222. As this Court has repeatedly stated, "a statute's silence * * * as to a particular issue means that Congress has not 'directly addressed the precise question at issue'[,] thus likely delegating gap-filling power to the agency." *United States* v. *Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012) (citation omitted); see, *e.g.*, *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1604 (2014) ("Under *Chevron*, we read Congress' silence as a delegation of authority to EPA to select from among reasonable options."); *Utility Air Reg. Grp.* v. *EPA*, 134 S. Ct. 2427, 2445 (2014) (noting that "[a]gencies exercise discretion" in "the interstices created by statutory silence or ambiguity"); *Entergy*, 556 U.S. at 222 ("It is eminently reasonable to conclude that § 1326(b)'s silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree.").

b. The court of appeals correctly concluded that P.L. 99-625 did not unambiguously foreclose the Service's determination that it had the authority to terminate the failed experimental plan. P.L. 99-625 provided that "[t]he Secretary *may* develop and implement" a "plan for the relocation and management of a population of California sea otters from the existing range of the parent population to another location." P.L. 99-625, § 1(b), 100 Stat. 3500 (emphasis added). But the statute nowhere *required* the Service to exercise that authority. Nor does the statute anywhere state that the Service, if it exercised its discretion to develop and implement a plan to create an experimental population, was obligated to "operate the translocation program in perpetuity." Pet. App. A17.

The court of appeals correctly rejected petitioners' argument that "scattered mandatory language" within the text of P.L. 99-625 had the effect of foreclosing the Service from rescinding its regulations. Pet. App. A16. The statute does establish certain specifications for any plan if the Service, in its discretion, chooses to pursue one. See, *e.g.*, *id.* at A17 (noting that "Section 1(b) of [P.L.] 99-625 says that the translocation plan 'shall include' a specified management zone"). But that language does not purport to direct what the Service may or must do if the experimental plan ultimately fails to achieve its purposes. Accord *id.* at C14 (noting that "[t]he language quoted by [petitioners] * * * neither requires the [Service] to develop the Plan nor prohibits the [Service] from repealing the Plan after it is developed"); *id.* at E18 ("There is nothing in the statute that would suggest * * * that, if the Service decided to embark on such a program, it would exist indefinitely.").

The court of appeals also was correct to conclude that the Service's interpretation of P.L. 99-625 was, at a minimum, a reasonable construction of the statute. In the Service's view, "the plain language of the statute" itself "g[i]ve[s] the Service discretion to determine whether a sea otter translocation program would ever be developed," and "[b]ecause implementing the program is discretionary, the Service had the discretion to both commence and cease implementation of the program." Pet. App. E17-E18; see also *id.* at C15 ("If the [Service] 'may . . . implement' the Plan, it follows that the agency may also stop implementing the plan."); cf. *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016) ("[W]e have emphasized that the 'word "may" clearly connotes discretion.'") (citation omitted). That conclusion is also supported by, *inter alia*, the "well-established general rule of administrative law * * * that agencies may, with reasoned explanation, repeal their own regulations." 15-56672 Gov't C.A. Br. 34-35 (citing, *inter alia*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51-52 (1983)); cf. Pet. App. C15-C16. The Service's interpretation of the statute is therefore correct as a matter of law and without any need to resort to doctrines of deference.

Even assuming arguendo that a more restrictive interpretation of the statute would also be permissible, however, the Service's view that it had discretion to terminate the failed experimental plan was clearly reasonable, for all of the reasons given by the court of appeals and both district courts. See Pet. App. A18-A20, C15-C18, E18-E25. First, even beyond making discretionary the Service's authority to "develop and implement" a plan, Congress further signaled its awareness of the provisional nature of the plan by referring repeatedly to the "experimental"

population. P.L. 99-625, § 1(a)(3) and (5)(A), (b)(3)-(5), and (c), 100 Stat. 3500-3501; see Pet. App. C16, E18. Second, although Congress mandated that any plan contain, *e.g.*, both a translocation zone and a management zone, it otherwise left significant plan details to the agency's discretion. See Pet. App. C16-C17 (reasoning that Congress "intended the agency to have wide discretion in deciding what efforts were feasible and consistent with the recovery of the species"). Third, Congress was on notice in enacting P.L. 99-625 that the Service intended to include "failure conditions" in any plan, see 51 Fed. Reg. at 29,371 (proposed rule), but it did not specify in the statute that a plan must persist indefinitely if the Service chose to adopt one. On the contrary, one of the co-sponsors of the original bill that ultimately led to P.L. 99-625 stated that "[i]f the Service determines that the translocation is not successful, it should, through the informal rulemaking process, repeal the rule authorizing the translocation." 131 Cong. Rec. 20,992 (1985) (Rep. Breaux).

The Service's interpretation also plainly furthers Congress's purposes. Here, the Service found that the plan had not only failed to aid in sea-otter conservation, but also that its continued implementation would affirmatively undermine the recovery of the species. Pet. App. A19. The text of P.L. 99-625, however, makes clear through its "repeated references to the ESA" that it was intended as species-protective legislation. *Id.* at A18; see, *e.g.*, P.L. 99-625, § 1(d), 100 Stat. 3501 (requiring the Service to consider, before implementing a plan, any determination made as to whether the plan would jeopardize the continued existence of an ESA-protected species). And P.L. 99-625 was "not intended to limit expansion of the northern parent population." Pet. App. A18; see P.L. 99-625, § 1(b)(4)(B), 100 Stat. 3500 (requiring that the

management zone not include the existing range of the species or adjacent ranges needed for expansion). By contrast, "[o]n [petitioners'] unwise interpretation of the statute, the Service would be required to continue the program even if no otters remained in the transplanted San Nicolas population," Pet. App. A19, and even "where, as here, the range of the parent population has expanded" into the former management zone, *ibid.* In other words, petitioners would "turn[] a statute with an express purpose of protecting otters into one that harmed otter populations." *Ibid.*

c. Petitioners fail to identify any error in the court of appeals' decision warranting reversal. Petitioners principally assert that, for a court properly to defer to an agency's statutory interpretation, the "power claimed by an agency [must] have at least some mooring in a statute's text," Pet. 5, and they assert that here there is "no statutory text to interpret," Pet. 17. As explained above, however, Congress not only expressly authorized the Service to issue regulations governing the activities in question here (*i.e.*, implementing a relocation-and-management plan for the southern sea otter), but it also expressly made that authority discretionary. Petitioners' suggestion that there is no "text [here] against which the Court could assess the agency's interpretation," Pet. 22, is insubstantial.

Nor did the court of appeals purport to issue any broad ruling "that, under *Chevron*, statutory silence requires courts to defer to agencies' assertions of power." Pet. 18. On the contrary, the court's reasoning was tied to the text, context, background, and purposes of the particular, species-specific statute at issue here. Indeed, the court emphasized the narrowness of its holding: "we hold only that in the circumstances here, where the agency has dis-

cretion to implement an experimental program, it can reasonably interpret the statute to allow it to terminate that program if the statute's purpose is no longer being served." Pet. App. A19. Petitioners' assertion that the court of appeals' decision applied *Chevron* in a manner that "departs dramatically from this Court's precedents," Pet. 21, thus is without merit.[6]

2. The decision below does not conflict with that of any other court of appeals. Petitioners assert that the Ninth Circuit's deference to the Service's construction of P.L. 99-625 cannot be reconciled with other courts of appeals' treatment of interpretive questions involving "statutory silence" in other contexts involving distinct statutes. But the decisions cited by petitioners simply confirm that the interpretation of statutory "silence," like statutory ambiguity, is context-dependent and requires resort to the available tools of statutory construction.

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[6] Petitioners cite various decisions of this Court, see Pet. 20-26, but fail to explain how they conflict in any way with the court of appeals' decision. See *Gonzales* v. *Oregon*, 546 U.S. 243, 268 (2006) (declining to defer to Attorney General's arrogation of interpretive authority to prohibit physician-assisted suicide, which was outside his statutory role under the Controlled Substances Act to "prevent[] doctors from engaging in illicit drug trafficking"); *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) (deferring to position of Federal Communications Commission that cable companies providing broadband Internet service were exempt from mandatory regulation, notwithstanding prior judicial construction to the contrary); *Brown & Williamson Tobacco Corp.*, 529 U.S. at 161 (holding that FDA lacked authority to regulate tobacco products); *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 220 (1994) (holding unreasonable the agency's interpretation of its authority to "modify" regulatory requirements as permitting wholesale exemptions from regulation).

For example, petitioners invoke (Pet. 18, 19, 25, 26, 28) the D.C. Circuit's en banc decision in *Railway Labor Executives' Ass'n* v. *National Mediation Board*, 29 F.3d 655 (1994), cert. denied, 514 U.S. 1032 (1995), which remarked that "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron*." *Id.* at 671. But the Ninth Circuit in this case did not rely on any such presumption or mere absence of an express withholding of authority to terminate the program. The D.C. Circuit's *Railway Labor Executives' Association* decision, moreover, involved the question whether an agency had power to act *sua sponte* to initiate an enforcement investigation that the statute required to be initiated by private complaint, not the question whether an agency had authority to discontinue a discretionary experimental program that Congress expressly authorized the agency to implement through the issuance of regulations. See *id.* at 664 ("[O]ur analysis leads us to the firm conclusion that Congress left no ambiguity in Section 2, Ninth: the Board may investigate a representation dispute *only* upon request of the employees involved in the dispute."). Indeed, in other cases, where the relevant statutory text and context have suggested the existence of a gap for an agency to fill—rather than an implicit withholding of authority by negative inference—the D.C. Circuit has upheld an agency's interpretation of statutory "silence." See, *e.g.*, *Americans for Clean Energy* v. *EPA*, 864 F.3d 691, 733 (2017); *Anna Jacques Hosp.* v. *Burwell*, 797 F.3d 1155, 1164 (2015); *Monroe Energy, LLC* v. *EPA*, 750 F.3d 909, 915-919 (2014); *Catawba County* v. *EPA*, 571 F.3d 20, 36-37 (2009) (per curiam); *Methodist Hosp. of Sacramento* v. *Shalala*, 38 F.3d 1225, 1230 (1994).

The three other cases cited by petitioners fall into the same pattern. See *Marlow* v. *New Food Guy, Inc.*, 861 F.3d 1157, 1162-1164 (10th Cir. 2017) (holding that the Secretary of Labor (DOL) lacked power to ban tip pooling generally, inasmuch as Congress expressly applied a statutory prohibition against tip pooling only to employers who take a tip credit);[7] *Chamber of Commerce of the U.S.* v. *NLRB*, 721 F.3d 152, 160-166 (4th Cir. 2013) (holding that Board lacked power to require employers to post notices, where statute nowhere granted any notice-posting power); *Bayou Lawn & Landscape Servs.* v. *Secretary of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013) (holding that DOL lacked power to regulate employment of temporary *non*-agricultural workers, where DOL had only been granted power to regulate employment of temporary agricultural workers). Indeed, in *Chamber of Commerce*, the Fourth Circuit specifically distinguished situations in which the interpretive question is whether Congress intended to create exceptions to the scope of an authority expressly granted to an agency, from situations in which it is unclear that Congress granted any regulatory authority in the first instance. See 712 F.3d at 159-160; see *Marlow*, 861 F.3d at 1164 (noting that agency there could not "point to any statutory language" from which the claimed power could be derived); *Bayou Lawn*, 713 F.3d at 1085

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[7] *Marlow* concerned the same agency regulation that was upheld by the Ninth Circuit in *Oregon Restaurant & Lodging Ass'n* v. *Perez*, 816 F.3d 1080 (2016), cert. denied, 138 S. Ct. 2670, and 138 S. Ct. 2697 (2018). See Pet. 25, 29 (citing the *Oregon Restaurant* decision). In responding to the petitions for a writ of certiorari in that case, this Office agreed that the statute at issue, properly read, precluded assertion of the regulatory power claimed by DOL. See, *e.g.*, Gov't Br. at 21-23, *National Rest. Ass'n* v. *Department of Labor*, No. 16-920 (May 22, 2018). This Court nonetheless denied the petitions on June 25, 2018.

(finding likelihood of success on claim that "DOL has exercised a rulemaking authority that it does not possess").

The courts of appeals thus have reached varying results not because those courts disagree about the meaning of "statutory silence," Pet. 6, but rather, because they agree that the appropriate conclusion to be drawn from silence depends on context, which necessarily differs from statute to statute and from case to case. See pp. 18-19, *supra*.

3. This case would be a poor candidate for this Court's review in any event because, on the current record, petitioners have failed to show standing to press their claims. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998) (court must resolve issues of Article III standing before it may adjudicate the merits of a plaintiff's claims). As described above, see pp. 12-14, *supra*, all three lower courts rejected petitioners' claim that the rescission of the regulations would expose petitioners to an imminent risk of prosecution for incidental taking of sea otters. The court of appeals did find standing based on the "alleged harm to shellfish populations," Pet. App. A15,[8] and upon its assessment that reinstating the translocation program would eliminate "one substantial legal roadblock" on the path to removing sea otters from the management zone, *ibid.* But petitioners themselves stated that they did *not* seek to remove sea otters from the management zone, but instead sought only freedom from liability for incidental takes. See pp. 13-14, *supra*. Although petitioners have attempted to dispute the significance of

[8] The court of appeals' reliance upon what petitioners "alleged" also overlooks that both appeals arose in a summary-judgment posture, in which a plaintiff must support its claims to standing with evidence and not merely "alleg[ations]." Pet. App. A14, A15.

that concession, see 15-56672 Pet. C.A. Br. 17, they nonetheless do not dispute that the Service is under no obligation to remove sea otters unless "feasible, nonlethal means" are available for doing so, which no party has shown to exist and which even the first district court similarly found "unlikely." Pet. App. C7 (citation omitted). Under these circumstances, petitioners have failed to make the necessary showing that it is "'likely,' as opposed to merely 'speculative,' that the[ir] injury will be 'redressed by a favorable decision'" in this litigation. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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