No. ________

In The

Supreme Court of the United States

CALIFORNIA SEA URCHIN COMMISSION, et al.,
Petitioners,

v.

SUSAN COMBS, et al.,
Respondents.

CALIFORNIA SEA URCHIN COMMISSION, et al.,
Petitioners,

v.

SUSAN COMBS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1986, Congress authorized the U.S. Fish and Wildlife Service to reintroduce sea otters into Southern California waters, conditioned on several mandatory protections for the surrounding fishery. In addition to dictating that the Service "shall" adopt a regulation that "must" contain the required fishery protections, the statute also directs that the Service "shall implement" the regulation. The statute says nothing about the Service revoking these mandatory protections.

Twenty-five years after accepting this authority and reintroducing sea otters into these waters, the Service repealed the regulation and terminated the statute's protections. Upholding that decision, the Ninth Circuit held that the statute "does not speak to the issue of termination at all." Because the statute is completely silent on the issue, the Ninth Circuit concluded it must defer to the agency's claim that it has this power under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The questions presented are:

1) If a statute neither authorizes nor forbids an agency action, does that statutory silence trigger *Chevron* deference?

2) If yes, how should courts measure the reasonableness of an agency's interpretation where that interpretation is not based on any statutory text but instead on the absence of relevant text?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The California Sea Urchin Commission, California Abalone Association, Commercial Fishermen of Santa Barbara, and California Lobster and Trap Fishermen's Association* are the plaintiffs in these consolidated cases and were appellants in the Ninth Circuit. Petitioners have no parent companies, subsidiaries, or affiliates that have issued shares to the public. No publicly held corporation holds more than a 10% ownership in any organization.

Defendants U.S. Department of Interior, U.S. Fish and Wildlife Service, Susan Combs, in her official capacity as Acting Assistant Secretary of Fish & Wildlife & Parks, and Greg Sheehan, in his official capacity as Principal Deputy Director of the U.S. Fish & Wildlife Service were respondents in that court. Friends of the Sea Otter, Humane Society of the United States, Defenders of Wildlife, Center for Biological Diversity, The Otter Project, Environmental Defense Center, and Los Angeles Waterkeeper are intervenor-defendants and were also respondents in the Ninth Circuit.

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* California Lobster and Trap Fishermen's Association was an plaintiff-appellant in No. 17-55428 but did not participate in No. 15-56672.

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PETITION FOR WRIT OF CERTIORARI

Petitioners California Sea Urchin Commission, California Abalone Association, Commercial Fishermen of Santa Barbara, and California Lobster and Trap Fishermen's Association respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is available at 883 F.3d 1173 (9th Cir. Mar. 1, 2018), and is reproduced in the Appendix at A-1. The district court's opinions are available at 239 F. Supp. 3d 1200 (C.D. Cal. Mar. 3, 2017), and 2015 WL 5737899 (C.D. Cal. Sept. 18, 2015), and both are reproduced in the Appendix at C-1 and E-1, respectively.

JURISDICTION

On September 18, 2015, and March 3, 2017, respectively, the district court granted summary judgment to the defendants in these consolidated cases. That decision was appealed to the Ninth Circuit, which affirmed on March 1, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AT ISSUE

Public Law No. 99-625 provides, in relevant part:

> SECTION 1. . . .
>
> . . . .
>
> (b) PLAN SPECIFICATIONS. — The Secretary may develop and implement, in accordance with this section, 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. The plan, which must be developed by regulation and administered by the Service in cooperation with the appropriate State agency, shall include the following:

(1) The number, age, and sex of sea otters proposed to be relocated.

(2) The manner in which the sea otters will be captured, translocated, released, monitored, and protected.

(3) The specification of a zone (hereinafter referred to as the "translocation zone") to which the experimental population will be relocated. The zone must have appropriate characteristics for furthering the conservation of the species.

(4) The specification of a zone (hereinafter referred to as the "management zone") that —

(A) surrounds the translocation zone; and

(B) does not include the existing range of the parent population or adjacent range where expansion is necessary for the recovery of the species.

The purpose of the management zone is to (i) facilitate the management of sea

otters and the containment of the experimental population within the translocation zone, and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone by the experimental population. Any sea otter found within the management zone shall be treated as a member of the experimental population. The Service shall use all feasible non-lethal means and measures to capture any sea otter found within the management zone and return it to either the translocation zone or to the range of the parent population.

(5) Measures, including an adequate funding mechanism, to isolate and contain the experimental population.

(6) A description of the relationship of the implementation of the plan to the status of the species under the Act and to determinations of the Secretary under section 7 of the Act. "16 USC 1536"

(c) STATUS OF MEMBERS OF THE EXPERIMENTAL POPULATION. — . . .

. . . .

(2) For purposes of section 7 of the Act, any member of the experimental population shall be treated while within the management zone as a member of a species that is proposed to be listed under section 4 of the Act.

> Section 9 of the Act “16 USC 1538” applies to members of the experimental population; except 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 Act or the Marine Mammal Protection Act of 1972. “16 USC 1361 note”

(d) IMPLEMENTATION OF PLAN. — The Secretary shall implement the plan developed under subsection (b) —

> (1) after the Secretary provides an opinion under section 7(b) of the Act regarding each prospective action for which consultation was initiated by a Federal agency or requested by a prospective permit or license applicant before April 1, 1986; or
>
> (2) if no consultation under section 7(a)(2) or (3) regarding any prospective action is initiated or requested by April 1, 1986, at any time after that date.

. . . .

(f) CONSTRUCTION. — For purposes of implementing the plan, no act by the Service, an authorized State agency, or an authorized agent of the Service or such an agency with respect to a sea otter that is necessary to effect the relocation or management of any sea otter under the plan may be treated as a violation of any provision of the Act or the Marine

Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.).

Pub. L. No. 99-625, § 1, 100 Stat. 3500 (1986).

INTRODUCTION

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, this Court held that, when Congress delegates to an agency authority to implement a statute, courts should defer to that agency's reasonable interpretation of any ambiguous statutory text. 467 U.S. 837 (1984). This case presents a novel twist on that holding, but one with tremendous practical and legal consequences.

Where a statute is completely silent on an issue—it neither delegates the question to the agency nor forbids agency action—does that silence implicitly invite the agency to take any action not expressly forbidden? In other words, must any power claimed by an agency have at least some mooring in a statute's text to receive deference? The resolution of that critical question invites another: if statutory silence requires courts to defer to agencies, how should courts assess whether the agency's interpretation is reasonable with no statutory text against which to measure it? This case presents an opportunity to decide these important questions.

Public Law No. 99-625 authorizes the U.S. Fish and Wildlife Service to reintroduce sea otters into Southern California waters, conditioned on the adoption and implementation of several protections for the surrounding fishery. Despite exercising the authority and establishing an otter population on San Nicolas Island, the Service has terminated the

protections required by the statute. The Ninth Circuit held that nothing in the statute authorized this action but that it also was not expressly forbidden. Notably, the statute contains no general delegation of authority permitting the agency to take any action it deems appropriate for implementing the statute.

Construing *Chevron* to require deference where a statute is silent about an agency's authority, the Ninth Circuit proceeded to consider whether the Service's actions were reasonable. Because the Ninth Circuit was relying on statutory silence, there was no text against which to measure reasonableness. Thus, the Ninth Circuit applied the second step of *Chevron* by asking whether the agency's actions could reflect a defensible policy choice.

This Court's review is necessary to resolve a split among the courts of appeals over whether statutory silence should be treated as an implicit and open-ended delegation to the agency to take any action not expressly forbidden. That conflict also presents vitally important federal questions about the nature of administrative agencies' power, the scope of *Chevron* deference, and the Constitution's separation of powers among the legislative, executive, and judicial branches. To resolve the conflict among the courts of appeals over this important question, the Court should grant this petition.

Two other petitions are currently pending before this Court urging review of the Ninth Circuit's statutory silence theory of *Chevron*. *See Wynn Las Vegas, LLC v. Cesarz*, No. 16-163 (filed Aug. 1, 2016); *Nat'l Rest. Ass'n v. U.S. Dep't of Labor*, No. 16-920 (filed Jan. 19, 2017). This case is a better vehicle to

decide the first question presented for two reasons. First, the Fair Labor Standards Act, the statute at issue in the other petitions, contains a general delegation of authority for the agency to issue any regulations it deems necessary to implement the statute, whereas Public Law No. 99-625 does not. *Cf. City of Arlington v. FCC*, 569 U.S. 290, 306 (2013) (noting that deference is rarely denied under statutes containing a general delegation of rulemaking authority). And this petition also presents a unique question: if the statutory silence theory is valid, how should courts assess the reasonableness of the agency's interpretation of that silence?

STATEMENT OF THE CASE

Statutory and Regulatory Background

Public Law No. 99-625

The southern sea otter is a protected subspecies under the Endangered Species Act and the Marine Mammal Protection Act. App. A-5.[1] Otters were hunted to near extinction in the 1700s and 1800s. *Id.* In the early 1980s, the southern sea otter subspecies' status was improving but its population numbers and range remained limited to California's central coast. *Id.* Due to this compact range, the Service was concerned that a single, catastrophic event, like an oil spill, could threaten the subspecies' survival. *Id.*

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[1] The otter species consists of this subspecies and other populations ranging from Alaska to Japan. *See* U.S. Fish & Wildlife Serv., *5-year review: Southern Sea Otter* (2015), https://www.fws.gov/ventura/docs/species/sso/Southern%20Sea%20Otter%205%20Year%20Review.pdf.

To address this risk, the Service proposed to reintroduce otters into Southern California waters by establishing a new colony in the Channel Islands. *Id.* The distance between the populations would ensure that a single event could not affect them both. *Id.* However, the Marine Mammal Protection Act did not permit the Service to catch and relocate otters for this purpose. *Id.* Therefore, the agency had to seek special authorization from Congress to proceed with the plan.

The plan proved controversial in Congress. Sea otter expansion into Southern California could create conflicts with other resources and significantly impact users of those waters. 132 Cong. Rec. S17321-22 (Oct. 18, 1986). In particular, sea otters, which must consume 33% of their body weight in shellfish and other seafood every day, could negatively affect the fishery. U.S. Fish & Wildlife Serv., *Final Supplemental Environmental Impact Statement: Translocation of Southern Sea Otters* 48 (Nov. 2012).[2] And, the potential application of the Endangered Species Act's and Marine Mammal Protection Act's "take" prohibitions could result in fishermen being imprisoned, fined tens of thousands of dollars, or enjoined from continuing their work if they accidentally catch or get too near a sea otter while fishing. *See, e.g.*, 16 U.S.C. §§ 1538(a), 1540.

Consequently, Congress was unwilling to give the Service the authority it sought without imposing some strings to mitigate these effects. Bringing every stakeholder to the table—including the agency,

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[2] https://www.fws.gov/ventura/docs/species/sso/fseis/Final%20Supplemental%20EIS%20on%20the%20Translocation%20of%20Southern%20Sea%20Otters%20-%20Volume%201.pdf.

fishermen, and environmental groups—Congress struck a compromise. 132 Cong. Rec. S17321-22. That compromise formed the basis of a short bill authorizing the Service to proceed, but only on the condition that measures be included to address the program's impacts.

Public Law No. 99-625 authorized the Service to develop and implement its plan to reintroduce otters into Southern California waters. However, "to prevent, to the maximum extent feasible, conflict with other fishery resources[,]" the agency "must" adopt a regulation for the program, which "shall include" protections for the surrounding fishery. Pub. L. No. 99-625, § 1(b).

In particular, the statute conditioned this authority on the establishment of a "management zone" around the new population from which the Service "shall use all feasible non-lethal means" to capture any otters that stray into the zone. *See id.* § 1(b)(4). The statute further provides that "any incidental taking" of sea otters "during the course of an otherwise lawful activity within the management zone, may not be treated as a violation of the Act or the Marine Mammal Protection Act of 1972." *Id.* § 1(c)(2).

Under a provision titled "Implementation of Plan," Congress commanded that the Service "shall implement" the regulation, with all of its mandatory elements, after completing any requested consultations under the Endangered Species Act or April 1, 1986, whichever came later. *Id.* § 1(d). To ensure no conflicts could arise between the statute and other laws, Congress also clarified that "no act by

the Service . . . with respect to a sea otter that is necessary to effect the relocation or management of any sea otter under the plan may be treated as a violation of any provision of the [Endangered Species] Act or the Marine Mammal Protection Act[.]" *Id.* § 1(f).

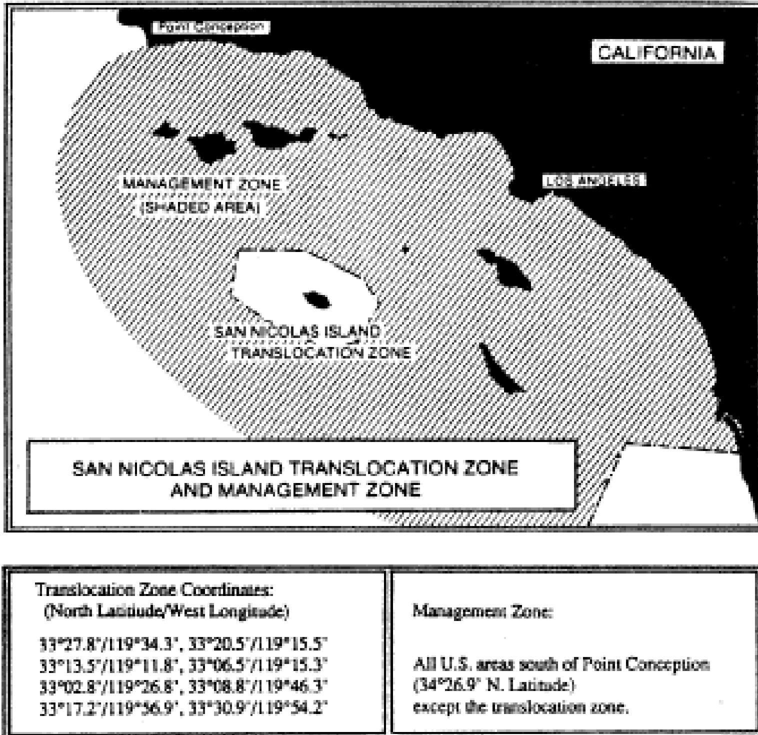
The statute delegates a few, discrete decisions to the agency, including "[t]he number, age, and sex of sea otters proposed to be relocated[;]" "[t]he manner in which the sea otters will be captured, translocated, released, monitored, and protected[;]" and setting the boundaries of the management zone "to prevent, to the maximum extent feasible, conflict with other fishery resources[.]" *Id.* § 1(b). But unlike many other statutes, Public Law No. 99-625 contains no general delegation authorizing the Service to take whatever steps it deems necessary to implement the statute. *Compare* Public Law No. 99-625 *with* 15 U.S.C. § 1604(a) (authorizing the Federal Reserve Board to issue any regulations "necessary or proper to effectuate" that statute's purposes).

If the requirements that the Service "must" issue a regulation that "shall" contain the protections, which it "shall implement," are insufficiently clear to foreclose the agency's power to discontinue them, the statute is utterly silent about the agency's power to do so.

The Service accepts Public Law No. 99-625's grant of authority

In 1987, the Service exercised the authority granted in Public Law No. 99-625. App. A-8. As required by the statute, it adopted a regulation providing for the movement of 250 otters to Southern California's San Nicolas Island and established a

management zone around the reintroduced population from Point Conception to the Mexican Border. 52 Fed. Reg. 29,754 (Aug. 11, 1987).



Translocation Zone Coordinates: (North Latitude/West Longitude)	Management Zone:
33°27.8'/119°34.3', 33°20.5'/119°15.5' 33°13.5'/119°11.8', 33°06.5'/119°15.3' 33°02.8'/119°26.8', 33°08.8'/119°46.3' 33°17.2'/119°56.9', 33°30.9'/119°54.2'	All U.S. areas south of Point Conception (34°26.9' N. Latitude) except the translocation zone.

The regulation incorporated the statute's fishery protections. It required the use of feasible, nonlethal means to remove otters that stray into the management zone. *See id.* And it exempted incidental take within this zone from the civil and criminal enforcement provisions of the Endangered Species Act and Marine Mammal Protection Act. *See id.*

However, the regulation also asserted the power to terminate these protections if the reintroduced population failed to achieve any of five benchmarks chosen by the agency. 52 Fed. Reg. at 29,772. One of

these benchmarks was that the population should reach 25 otters within three years. *Id.* According to the regulation, if the population failed to meet a benchmark and the Service could not determine the cause, the Service would terminate the plan and return the otters to California's central coast. *Id.*

The San Nicolas Island otter population

Between 1987 and 1990, 140 sea otters were released at San Nicolas Island, less than the Service's planned 250 otters. Establishing the population proved not to be as easy as the Service had assumed. Most of the released animals swam back home to the central coast.[3] 77 Fed. Reg. 75,266, 75,269 (Dec. 19, 2012). Consequently, the population was initially much smaller than anticipated. But, by the early 2000s, the population was growing at a healthy rate of seven percent per year. *Id.* Due to this growth, the population consisted of 48 adult otters and five pups in 2011. *Id.*

The larger central coast population also continued to grow over the decades. Beginning in the late 1990s, otters from that population began seasonally moving south of Point Conception into the management zone. *Id.*

Both the central coast population and the San Nicolas Island population continue their healthy growth. In 2016, the southern sea otter subspecies reached its recovery goal under the Endangered

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[3] Because of this high dispersal rate, the Service suspended its efforts to remove otters from the management zone in 1994, concluding that there was, at that time, no feasible, nonlethal means of containing the otters. 77 Fed. Reg. at 75,279.

Species Act for the first time. *See* Press Release, U.S. Geological Survey, *Sea Otter Survey Encouraging, but Comes Up Short of the "Perfect Story"* (Sept. 19, 2016).[4] That was due in part to a near doubling of the growth rate—to 13% per year—of the San Nicolas Island population. *Id.* (""The sea otters at San Nicolas Island continue to thrive, and some may eventually emigrate to and colonize other Channel Islands in southern California[.]""). In 2016, the population consisted of 92 adult otters and 12 pups, nearly double that of five years earlier. M. Tim Tinker & Brian B. Hatfield, U.S. Geological Survey, *Annual California Sea Otter Census – 2016 Spring Census Summary* (2016).[5]

The Service terminates the statute's protections

In response to a lawsuit brought by the Otter Project and Environmental Defense Center, the Service declared the San Nicolas Island population a failure in 2012 and repealed the regulation implementing Public Law No. 99-625's fishery protections. *See* App. A-9, B-3. The agency based that 2012 decision on the population's failure to reach the agency's benchmark of 25 otters by 1990. 77 Fed. Reg. at 75,287-88. The Service declined to consider the

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[4] https://www.usgs.gov/news/sea-otter-survey-encouraging-comes-short-perfect-story.

[5] https://www.sciencebase.gov/catalog/item/57a34c9ce4b006cb45567b0e. The most recent count in 2017 showed a slight dip, likely due to increased shark predation at the edges of the central coast population's range. *See* M. Tim Tinker & Brian B. Hatfield, U.S. Geological Survey, *Annual California Sea Otter Census – 2017 Spring Census Summary* (2017), https://www.sciencebase.gov/catalog/item/59b9c1d3e4b091459a54db7a. But the otter population remains above its Endangered Species Act recovery goal. *Id.*

population's subsequent growth or the size of the population in 2012 because the benchmarks all focused on the population's status 20 or more years earlier. *Id.* at 75,280.

Although the 1987 regulation required the otters to be removed from Southern California if the statute's protections were terminated, the Service declared in the 2012 rule that it would not do so. *Id.* Thus, a healthy and growing otter population resides in Southern California thanks to the authority Congress granted the agency in Public Law No. 99-625. But the conditions to protect the surrounding fishery that Congress placed on that authority no longer apply. *Id.*

Impacts to the Fishermen

The Service's having its cake and eating it too comes at significant cost to the Plaintiffs (collectively, the Fishermen). The California Sea Urchin Commission—the state agency charged with representing the interests of California's licensed sea urchin divers—will have its efforts to promote a sustainable urchin fishery frustrated by increased predation and greater risks to divers. *See* Decl. of David J. Goldenberg, *Cal. Sea Urchin Comm'n v. Bean*, No. 13-cv-05517, ECF No. 93-4 (filed Nov. 11, 2016). The Service's decision will also undermine the California Abalone Association's efforts to recover California's abalone, including endangered white abalone whose U.S. range is limited to the management zone,[6] because otter expansion will

[6] *See* NOAA Fisheries, *White Abalone*, http://www.nmfs.noaa.gov/ pr/species/invertebrates/abalone/white-abalone.html.

further deplete that struggling population. *See* Decl. of Michael Harrington, *Cal. Sea Urchin Comm'n v. Bean*, No. 13-cv-05517, ECF No. 93-5 (filed Nov. 11, 2016). The Service's actions also expose to substantial criminal and civil penalties any Southern California fishermen who encounter otters during their work in the former management zone, should they accidentally catch or get too near an otter. *See id.*

Proceedings Below

District Court decisions

In July 2013, the Fishermen filed a suit (*Sea Urchin I*) challenging the 2012 decision. *See* App. C-1. The district court dismissed the case on statute of limitations grounds, but the Ninth Circuit reversed on appeal. *See Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1048 (9th Cir. 2016).

After *Sea Urchin I* was dismissed, the Fishermen submitted a petition urging the Service to reverse the rule because Public Law No. 99-625 does not authorize the Service to unilaterally relieve itself of the statute's mandatory requirements. App. A-10. While the appeal of the dismissal was pending before the Ninth Circuit, the Service denied the Fishermen's petition and the Fishermen filed a lawsuit challenging that denial (*Sea Urchin II*). App. E-1. In *Sea Urchin II*, the district court granted summary judgment to the Service, ruling that the Fishermen lacked standing, their petition did not satisfy the Administrative Procedure Act's requirements,[7] and that nothing in Public Law

[7] On appeal, the Service acknowledged that this aspect of the district court's decision was wrong as a matter of law.

No. 99-625 prohibited the Service from terminating its protections. App. E-16 to E-25.

On remand in *Sea Urchin I*, the district court also granted summary judgment to the Service. App. C-1. Contrary to *Sea Urchin II*, the district court ruled that the Fishermen have standing to challenge the Service's decision. App. C-3 to C-10. However, the court sided with the Service on the merits. App. C-14 to C-18.

Ninth Circuit's decision in the consolidated cases

Sea Urchin I and *Sea Urchin II* were consolidated at the Ninth Circuit, which affirmed both cases, but not on all grounds. App. A-1.

The Ninth Circuit determined that the Fishermen have standing to challenge the termination of the statute's protections, rejecting the district court's reasoning in *Sea Urchin II*. App. A-11 to A-15. Citing their interest in protecting the health of the fishery in the management zone, the Ninth Circuit held that "if the [ ] program is reinstated, one substantial legal roadblock [to protecting that interest] will be removed." App. A-15. Thus, "the plaintiffs have standing based on the alleged harm to shellfish populations." *Id.*[8]

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[8] The Fishermen also have standing as the objects of the regulation. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (the object of a regulation has standing if "the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practice; [and] if they fail to observe [the regulation] they are quite clearly exposed to the imposition of strong sanctions"). The Ninth Circuit disagreed, holding that the object of a regulation must show a threat of enforcement to challenge a newly enacted, and perhaps

However, the Ninth Circuit sided with the Service on the merits. First, it considered whether the text of the statute permits or forbids the Service from terminating the statute's protections for the fishery, concluding that the statute "does not speak to the issue of termination at all." App. A-17. Citing *Chevron*, the Ninth Circuit explained that "[b]ecause 'the statute is silent[,]'" courts must defer to the agency on the issue. *Id.* (quoting *Chevron*, 467 U.S. at 843).

Having no statutory text to interpret, the Ninth Circuit assessed the reasonableness of the agency's position by asking whether terminating these protections could reflect a reasonable policy choice. App. A-18 to A-22. The court concluded that it could, based on the general purposes of this and other statutes, especially the Endangered Species Act. *Id.*; *but see* Pub. L. No. 99-625, § 1(c)(2) (exempting implementation of the statute from the Endangered Species Act). The Ninth Circuit rejected the Fishermen's argument that a power with no mooring in the statute's text would necessarily lack an intelligible principle to guide its exercise, contrary to the nondelegation doctrine. App. A-20 to A-21.

The Fishermen also argued that the Service's interpretation conflicts with Congress's reliance on the continued application of Public Law No. 99-625's

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not yet enforced, regulation. App. A-13. If this Court had any concerns about the Fishermen's standing based on their interest in the fishery, it could find standing on the alternative "object of the regulation" grounds. *Cf. Sackett v. EPA*, 566 U.S. 120, 125-26 (2012) (a regulated party can challenge a final agency action under the Administrative Procedure Act without having to wait for the agency to bring an enforcement action).

incidental take exemption when it excluded this species—and no other—from amendments to the Marine Mammal Protection Act. *See* 16 U.S.C. § 1387(a). The Ninth Circuit rejected this argument too. App. A-22.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is the latest application of its idiosyncratic view that, under *Chevron*, statutory silence requires courts to defer to agencies' assertions of power—a position which conflicts with the views of several other circuits. *Compare* App. A-17 *with Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994). If this Court were to adopt the Ninth Circuit's approach to *Chevron* deference, that would present a further, related question: how does a court assess the reasonableness of an agency's interpretation where that interpretation is not based on any text but the absence of relevant text?

These are fundamental questions about the nature of administrative power, the scope of *Chevron* deference, and the Constitution's separation of powers between the legislative, executive, and judicial branches. The Ninth Circuit has effectively reversed the fundamental principle of administrative law—that agencies only have the power Congress chooses to give them. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The Ninth Circuit has expanded *Chevron* deference well beyond this Court's cases. To defer to an agency on a question that Congress has delegated to that agency, however ambiguously, is one thing; but it is quite another to presume agency power from Congress's failure to explicitly and

unambiguously deny it. That expansion of *Chevron* would fundamentally change the relationship between Congress and administrative agencies, and greatly increase already prevalent separation-of-powers concerns about the doctrine. *See* Philip Hamburger, *Is Administrative Law Unlawful* 315-17, 319-21 (2014); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 498 (1989).

These questions also implicate a significant and important split among the circuits. *See Ry. Labor Executives' Ass'n*, 29 F.3d at 671 (rejecting the statutory silence theory); *Chamber of Commerce of United States v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) (same); *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1162 (10th Cir. 2017) (same); *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013) (same). To resolve this split of authority and the important federal questions presented by it, this Court should grant the petition.

I

Whether *Chevron* Deference Is Triggered by Statutory Silence Is an Important Question of Federal Law That Has Divided the Courts of Appeals

The basic premise of *Chevron* deference is that, when Congress delegates authority to an agency, it expects the agency to resolve ambiguities in the provisions the agency is charged with implementing. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996) (describing the "presumption that Congress . . . left ambiguity in a statute" to delegate to the

agency the power to resolve that ambiguity). This explains the doctrine's familiar two-step process. First, courts look to the text of the statute to determine whether it is ambiguous. *Chevron*, 467 U.S. at 842-43. If the meaning of the statute's text is clear, that meaning controls, no matter whether the agency or courts think it reflects the best policy. Only if the text is ambiguous do courts ask whether the agency charged with implementing the statute has resolved that ambiguity in a reasonable way. *See Michigan v EPA*, 135 S. Ct. 2699, 2708 (2015) (explaining that *Chevron* "allows agencies to choose among competing reasonable interpretations of a statute").

Here, the Ninth Circuit concluded that there was no text in the statute, ambiguous or otherwise, to support the agency's power to terminate the statute's mandated protections. "Public Law 99-625 . . . does not speak to the issue of termination at all." App. A-17. This statute also does not contain a general delegation to the Service to issue any regulations it deems useful to implement the statute. Thus, the Ninth Circuit relied exclusively on statutory silence to trigger *Chevron* deference.

That holding expands the doctrine far beyond this Court's past cases. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."). It deepens an existing conflict between the Ninth Circuit and every other circuit to consider this question. And it exacerbates separation-of-powers concerns about *Chevron* deference. For these reasons, this petition

presents an important question of federal law that this Court has not decided but should.

A. The Ninth Circuit's theory of *Chevron* departs dramatically from this Court's precedents

The Ninth Circuit's statutory silence theory expands *Chevron* deference far beyond this Court's precedents. To support its theory, the Ninth Circuit cited *Chevron* for the proposition that "if the statute *is silent* or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843 (emphasis added). However, a close reading of the case shows that this reference to silence does not mean what the Ninth Circuit interpreted it to mean.[9]

In the Clean Air Act, Congress explicitly delegated to EPA the power to implement a program for the permitting of air pollution emissions from "stationary sources." *See Chevron*, 467 U.S. at 850; *see also* 42 U.S.C. § 7502. Congress did not define this phrase, which is ambiguous on whether it refers to an

[9] The cases this Court cited in *Chevron* all included some textual basis for the delegation—none upheld agency power based on the statute's complete silence on an issue. *See INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) (interpreting a statute that "commits" the definition of a term "in the first instance to the Attorney General and his delegates"); *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975) (noting that the Clean Air Act expressly charges EPA with reviewing and approving state implementation plans for air quality); *Morton v. Ruiz*, 415 U.S. 199, 231-32 & n.26 (1974) (relying on an explicit delegation to the Secretary of Interior and the Bureau of Indian Affairs over "the management of all Indian affairs and of all matters arising out of Indian relations").

entire plant or to each source of pollution within a plant, *i.e.*, an individual smoke stack. *See Chevron*, 467 U.S. at 850-51. Because the statute expressly delegated to EPA the authority to implement this provision, the Court concluded that Congress would have expected the agency to resolve the ambiguity. *Id.* at 865.

True, the Clean Air Act did not expressly state that EPA could issue regulations interpreting this phrase and was, in that sense, "silent." But by directing EPA to implement the permit program for stationary sources, Congress would have expected the agency to interpret it rather than declaring it ambiguous and throwing up its hands. *See id.* at 843 (When Congress has "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation[.]"). There was an explicit statutory delegation, albeit an ambiguous one; thus, there was some text against which the Court could assess the agency's interpretation. *See New Food Guy, Inc.*, 861 F.3d at 1163.

In *Chevron* and every other case from this Court applying the doctrine, agency claims to power enjoyed some mooring in the text of the statute. *See Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (To be entitled to deference, "the rule must be promulgated pursuant to authority Congress has delegated to the official."). For instance, in *National Cable & Telecommunications Association v. Brand X Internet Services*, this Court considered FCC's authority to "execute and enforce" the Communications Act, including the power to "prescribe such rules and regulations as may be necessary in the public interest to carry out the

provisions" of the Act. 545 U.S. 967, 980 (2005). The Communications Act subjected providers of "communications services" to common-carrier regulations. *See id.* Consequently, in implementing its delegated power, FCC had to interpret this phrase and its interpretation was entitled to deference. *Id.*

This Court has refused to defer to agency claims to power lacking any textual hook. In *Gonzales v. Oregon*, the Court refused to defer to the Attorney General's rule interpreting the Controlled Substances Act to forbid physician-assisted suicide. 546 U.S. at 248. "*Chevron* deference," the Court explained "is not accorded merely because the statute is ambiguous and an administrative official is involved." *Id.* at 258. To be sure, the Controlled Substances Act did not expressly forbid the Attorney General from issuing this prohibition. But that was beside the point because "the rule must be promulgated pursuant to authority Congress has delegated to the official." *Id.* Resolving that question required the Court to look to "the language of the delegation provision itself." *Id.*

Similarly, in *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, the Court held an agency is not entitled to *Chevron* deference when it claims power "beyond the meaning that the statute can bear[.]" 512 U.S. 218, 229 (1994). In that case, the FCC exempted some common carriers from the Communications Act's tariff filing requirement. *Id.* at 220. Nothing in the statute forbade the agency from doing so, but there was also no text to support such a power. The Communications Act only authorized the Commission to "modify" any requirement under the act. *See id.* at 225-26. Interpreting this term to permit only minor tweaks to

regulatory requirements, not wholesale exemptions, the Court held that the Commission's interpretation could not receive deference because its asserted power had no basis in the text of the statute. *Id.* at 229.

By holding that *Chevron* deference is triggered whenever a statute "does not speak to [an] issue . . . at all[,]" the Ninth Circuit has expanded the doctrine well beyond this Court's precedents. App. A-17. It did so in the context of a statute that largely speaks in mandatory, not discretionary, terms. Public Law No. 99-625 explicitly delegates few, discrete decisions to the service (e.g., the age, sex, and number of otters to be relocated). Pub. L. No. 99-625, § 1(b). Unlike many other statutes, Public Law No. 99-625 does not delegate to the Service general power to issue any regulations it deems appropriate to implement the statute. *See Gonzales*, 546 U.S. at 258-59 (providing examples of general delegation provisions).

Most of the statute is directed to actions that the Service must do as a condition of establishing the otter population. It "shall" enact a regulation that "must" contain several fishery protections. Pub. L. No. 99-625, § 1(b). Incidental take in the management zone "shall not" be treated as a violation of the Endangered Species Act or Marine Mammal Protection Act. *Id.* § 1(c). And, for good measure, the Service "shall implement" the regulation. *Id.* § 1(d).

There is nothing inherent in any of Public Law No. 99-625's narrow delegations or broad mandates that anticipates that the Service will decide whether it can or should void the statute's mandates. *Cf. City of Arlington v. FCC*, 569 U.S. at 296 ("Congress knows to speak in plain terms when it wishes to

circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.”).

Furthermore, there would be no reason for Congress to specify decisions that it was delegating to the agency if it intended to confer, by implication, power to take any action not forbidden. *See Gonzales*, 546 U.S. at 262 (“It would be anomalous for Congress to have so painstakingly described the Attorney General’s limited authority . . . but to have given him, just by implication,” much broader authority.); *cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) (“Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”).

Consequently, the Ninth Circuit’s statutory silence theory extends *Chevron* far beyond this Court’s cases. “Instead of requiring that administrative rulemaking be rooted in a congressional delegation of authority,” *see Oregon Restaurant & Lodging Ass’n v. Perez*, 816 F.3d 1080, 1094 (9th Cir. 2016) (Smith, J., dissenting), it presumes a delegation where Congress fails to include a litany of “thou shalt nots” directed at the agency. *See Ry. Labor Execs.’ Ass’n*, 29 F.3d at 671; *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1531. “*Chevron* deference does not work that way.” *Oregon Restaurant*, 816 F.3d at 1094 (Smith, J., dissenting).

The doctrine should not be expanded to cases of pure statutory silence without this Court’s careful

scrutiny. And, if *Chevron* can be stretched so far, it should be reconsidered. *Cf. Michigan v. EPA*, 135 S. Ct. at 2712-14 (Thomas, J., concurring).

B. The Ninth Circuit's theory of *Chevron* conflicts with the decisions of four other circuits

The questions presented also merit this Court's attention because they implicate a conflict among the circuits. The Ninth Circuit alone holds that *Chevron* deference is triggered when a statute does not speak to an issue at all. Every other circuit to consider the question has reached the opposite conclusion.

The *en banc* D.C. Circuit, for instance, has rejected the theory "that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in 'thou shalt not' terms)." *Ry. Labor Execs.' Ass'n*, 29 F.3d at 671. That theory "is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Id.* "[T]o *presume* a delegation of power" from the absence of "an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.*

The Fourth Circuit concurs with the D.C. Circuit. In *Chamber of Commerce v. NLRB*, it held "[t]he fact that none of the Act's provisions contain language specifically limiting the Board's authority to enact a . . . requirement" is not an open invitation for the agency to do as it pleases. 721 F.3d at 160. In that case, as in this one, the statute contained "no general

grant of power" to the agency, which "reflects the absence of statutory authority for actions outside [a few] defined responsibilities as a threshold matter." *Id.* Courts "do not presume a delegation of power simply from the absence of an express withholding of power." *Id.*

The decision below also conflicts with Tenth Circuit precedent. In *Marlow v. New Food Guy, Inc.*, that court explicitly rejected the Ninth Circuit's statutory silence theory. 861 F.3d at 1162. Acknowledging *Chevron*'s reference to statutory silence, the Tenth Circuit explained "when the [Supreme] Court has spoken of such silences or gaps, it has been considering undefined terms in a statute or statutory directive to perform a specific task without giving detailed instructions." *Id.* at 1163. In *New Food Guy*, in contrast, the agency could "not point to any statutory language" from which its claimed power could be derived, relying "instead on the *absence* of any statutory directive to the contrary." *Id.* at 1164. "[S]ilence[,]" the Tenth Circuit held, "is no 'gap' for an agency to fill." *Id.*

The Eleventh Circuit, in rejecting the statutory silence theory, has stressed the significant separation-of-powers problems it poses. "[I]f congressional silence is a sufficient basis upon which an agency may build a rulemaking authority, the relationship between the executive and legislative branches would undergo a fundamental change[.]" *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d at 1085. In that case, the Department of Labor claimed the power to issue regulations for temporary, non-agricultural foreign workers. *Id.* at 1083-84. No text in the statute authorized such regulation, but there was also

nothing prohibiting it. Important to the Eleventh Circuit's decision was the absence of any general grant of rulemaking authority to the Department of Labor, an absence made more conspicuous by the explicit delegation of other powers to the agency. *Id.* at 1084. "The absence of a [general] delegation . . . in the presence of a specific delegation" foreclosed broader power. *Id.*

This case would be decided differently under the holdings of the D.C., Fourth, Tenth, or Eleventh Circuits. The Service's interpretation impermissibly relies on statutory silence, rather than any grounding in the statute's text. *See New Food Guy*, 861 F.3d at 1163; *Ry. Labor Execs.' Ass'n*, 29 F.3d at 671. Furthermore, Public Law No. 99-625 explicitly confers a few specific delegations, but no general delegation that the Service can rely on. *See Bayou Lawn & Landscape*, 713 F.3d at 1084; *Chamber of Commerce*, 721 F.3d at 160. And Congress's decision to compel the Service to establish the management zone protections, giving the agency only the narrower discretion to set the zone's boundaries based on statutory factors, would contradict the agency's interpretation. *See Bayou Law & Landscape*, 713 F.3d at 1084.[10]

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[10] The Ninth Circuit correctly rejected the Service's argument that Public Law No. 99-625's initial authorization to develop and implement the plan also gives broad discretion to terminate the statute's mandatory elements. *See* App. A-19 ("[W]e are skeptical that such a principle would be sound."). That reading of the statute would contradict Congress's decision to make the creation of the management and implementation of its fishery protections a mandatory condition on the Service exercising this authority. *Cf. United States v. Atlantic Research Corp.*, 551 U.S. 128, 135 (2007) ("Statutes must 'be read as a whole.'" (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991))).

Consequently, the Service's interpretation would not be entitled to deference under the holdings of these circuits.

The statutory silence theory is controversial even within the Ninth Circuit. In another recent case concerning this theory, Judge O'Scannlain—writing on behalf of ten of his colleagues—dissented from the denial of rehearing *en banc*, describing the theory as an "unsupported and indefensible idea[.]" *Oregon Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 365-66 (9th Cir. 2016) (O'Scannlain, J., dissenting). He went on to explain that "[s]uch notion is completely out of step with the most basic principles of administrative law, if not the rule of law itself." *Id.* at 366.

That case and another related case are currently before this Court on petitions for *certiorari*. *Wynn* (No. 16-163) and *National Restaurant Association* (No. 16-920) both arise under the Fair Labor Standards Act and challenge the Secretary of Labor's assertion of the power to regulate tip pooling by employers who do not take a tip credit under federal minimum-wage laws. *Id.* at 356. The growing number of cases out of the Ninth Circuit following the statutory silence theory demonstrates the importance of the question presented and urgent need for this Court's review.

As noted above, this case has two significant advantages over *Wynn* and *National Restaurant Association* that will aid this Court as it considers the important question presented in the three petitions. Public Law No. 99-625 contains no general delegation to the agency to issue any regulations it deems appropriate to implement the statute. The Fair Labor Standards Act, in contrast, authorizes the Secretary

of Labor to "prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act." 1974 Amendments, Pub. L. No. 93-259, § 29(b), 88 Stat. 55. This potentially provides a mooring in the text for the Secretary of Labor's claimed power. *Cf. City of Arlington*, 569 U.S. at 306 ("There is no . . . case" where "a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field."). Because Congress declined to include any similar provision in Public Law No. 99-625, this is a clearer case in which the agency's assertion of authority must stand or fall on statutory silence alone and cannot be upheld on some other ground. This petition also presents an important related question unique to this petition: if the statutory silence theory is valid, how should courts assess the reasonableness of the agency's interpretation, without any text against which to measure it?

C. The Ninth Circuit's theory worsens *Chevron*'s tension with the separation of powers

Finally, the Ninth Circuit's statutory silence theory presents an important question of federal law that this Court should resolve because it exacerbates concerns that *Chevron* deference threatens the Constitution's separation of powers. *See, e.g., Michigan v. EPA*, 135 S. Ct. at 2714 (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); Hamburger, *supra* at 319-21; Farina, *supra* at 498.

"*Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate[s] federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). *Chevron* replaces "an independent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law" with "an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day." *Id.* at 1153. In the best of circumstances, *Chevron* deference transfers some legislative power and some judicial power to the executive. But the Ninth Circuit's statutory silence theory effects a much broader—and more troubling—transfer, without any indication that Congress intended this result.

The people, through the Constitution, delegated legislative power to Congress. U.S. Const. art. I, § 1. Congress may not redelegate that power—a "principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). To prevent the abuse of legislative power, the Constitution erects barriers to its exercise, including bicameralism, presentment, and Congress's direct electoral accountability to the people. Agencies, run by unelected bureaucrats, face no such constraints.

Consequently, agencies have no inherent authority but only enjoy the power that "Congress . . . clearly provided, explicitly or implicitly." Sales & Adler, *supra* at 1531. "[S]tatutory silence does not, in itself, create an ambiguity about whether power has

been sufficiently delegated to trigger *Chevron* deference." *Id.*; *City of Arlington*, 569 U.S. at 317 (Roberts, C.J., dissenting) (An agency "has no power to act . . . unless and until Congress confers power upon it." (citation omitted)).

If agency power were presumed from the fact that a statute does not address an issue at all, "this shift in power would substantially undermine our constitutional commitment to representative government." Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 Nw. U. L. Rev. 1239, 1282 (2002). Were Courts to accept this theory, "the potential breadth of implied agency delegation would be simply stunning." Linda D. Jellum, *Dodging the Taxman: Why the Treasury's Anti-Abuse Regulation Is Unconstitutional*, 70 U. Miami L. Rev. 152, 195-96 (2015).

Chevron's presumption that any ambiguity in a statute indicates that Congress intended to delegate the question to the agency is itself dubious. *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 Yale L.J. 676, 689 (2007). But applying the same presumption to Congress's failure to explicitly repudiate unaddressed powers would be radically out of step with the way Congress legislates. Few statutes include exhaustive "thou shalt not" lists for the agency implementing them. Instead, Congress writes statutes to authorize agency power when it wishes to grant it, subject to any limits it deems appropriate. *See Smiley*, 517 U.S. at 740-41.

The Ninth Circuit's statutory silence theory does more than transfer large amounts of Congress's legislative power to administrative agencies. It also invites agencies to intrude on the Court's judicial power. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1220 (2015) (Thomas, J., concurring). "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "The rise of the modern administrative state has not changed that duty." *City of Arlington*, 569 U.S. at 316 (Roberts, C.J., dissenting). Congress, for its part, confirmed in the Administrative Procedure Act that courts, not agencies, must decide "all relevant questions of law." 5 U.S.C. § 706.

To satisfy that duty, courts must first assure themselves that Congress "has in fact delegated to the agency lawmaking power over the ambiguity at issue." *City of Arlington*, 569 U.S. at 317 (Roberts, C.J., dissenting). This requires some basis for the agency's power in the statute's text. Importantly, refusing to extend deference to an agency's claim to power from statutory silence does not present the risk of judicial aggrandizement that has concerned this Court in other *Chevron* cases. *See* Spencer S. Fritts, Comment, Perez*: A Call for a Renewed Look at* Chevron*, Jurisdictional Questions, and Statutory Silence*, 40 Campbell L. Rev. 173, 202 (2018).

Unfortunately, *Chevron* has shifted courts away from the neutral arbiters of the law that our Constitution envisions. Where *Chevron* deference applies, the odds that a court will side with the agency skyrockets to 77.4%, compared to 56% under the lesser *Skidmore* deference and 38% when courts

exercise de novo review. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6-8 (2017). "If [impartiality] means anything, it surely requires a judge not to defer to one of the parties, let alone to defer systematically to the government." Hamburger, *supra* at 312. That situation will worsen considerably if agencies no longer need even identify some basis in statutory text to support their aggrandizing behavior.

The problems plaguing administrative deference are "perhaps insoluble if *Chevron* is not to be uprooted." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring). *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive." *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring) (citation omitted). In light of these concerns, the Ninth Circuit's decision is a leap in the wrong direction.

II

How Courts Assess the Reasonableness of an Agency's Interpretation Under the Statutory Silence Theory Is Also an Important Question of Federal Law

This case also presents the important related question: if statutory silence triggers *Chevron* deference, how should courts assess the reasonableness of an agency's interpretation when it is not moored in statutory text but the absence of any relevant text? Under *Chevron*, once a Court concludes that a statute is ambiguous, it should consider whether the agency's interpretation of the statute is reasonable. 467 U.S. at 844.

"*Chevron*'s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Global Tel*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring). For the reasonableness analysis to have teeth, however, courts must hold agencies to the language of the statute, rather than allowing them a free hand to pursue their policy objectives. *See id.* Relying only on an agency's broad articulation of a statute's purpose, without any statutory text to ground it, would "license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan*, 135 S. Ct. at 2708.

In *Michigan*, for example, this Court rejected EPA's interpretation of the Clean Air Act's hazardous air pollutants provisions to forbid consideration of costs. 135 S. Ct. at 2699. Beginning from the premise that "agencies must operate within the bounds of reasonable interpretation[,]" the Court's analysis focused on the text of the statute. *Id.* at 2707. The Court was unpersuaded by EPA's argument that its interpretation should be upheld because it allows the agency to more aggressively pursue the Clean Air Act's public health goals. *Id.* at 2709. The choice to balance competing interests belongs to Congress and there was no indication in the statute's text that it balanced those interests in the way the agency preferred. *See id.* (comparing the provision at issue to others that excluded cost considerations).

Where an agency's claim to power is based on the absence of any relevant statutory text, reasonableness

review devolves into whether the agency has made a policy decision that is defensible in the abstract. This risks "creat[ing] the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes." *Zuni Public Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107 (2007) (Kennedy, J., concurring).

Allowing statutory silence to trigger deference to an agency's claim to power also presents a unique challenge under this Court's nondelegation doctrine. Although this Court's precedents generally permit Congress to delegate rulemaking power to agencies, they nonetheless insist that Congress make the major policy choices underlying those decisions. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989).

Congress, not the agency, must establish the intelligible principle that guides the exercise of power. *See id*. Even under the best of circumstances, *Chevron* deference can raise nondelegation concerns. *See, e.g., Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring). But the statutory silence theory necessarily does so. Congress cannot establish an intelligible principle to guide the exercise of power through silence; if a statute truly does not address whether some power exists, it also will not dictate the principles to guide its exercise.

In this case, the Ninth Circuit tried to get around the nondelegation problem by extending the factors used to set the boundary of the management zone to the unspoken power to terminate that zone, as well as general reliance on the purposes of the Endangered Species Act. But this judicial rewrite of the statute is

untenable for several reasons. First, the Endangered Species Act can hardly provide the intelligible principle for a statute that Congress explicitly exempted from the Endangered Species Act. *See* Pub. L. No. 99-625, § 1(c)(2) (exempting implementation of the statute from the Endangered Species Act). Second, the Ninth Circuit's rewrite would mean that the Service could have relied on the management zone factors to justify declining to create a management zone *ab initio*, which would plainly conflict with the statute's direction that the Service "shall" establish this zone. *See* Pub. L. No. 99-625, § 1(b).

Finally, and most importantly, the Ninth Circuit's attempt to resolve the conflict between the statutory silence theory and the nondelegation doctrine misunderstands the purpose behind the intelligible principle requirement. That purpose is to ensure that Congress decides how a particular power should be exercised. *See Mistretta*, 488 U.S. at 372-73. It is not served by allowing an agency to do whatever is not expressly forbidden, so long as it can divine an intelligible principle of its own choosing from an unrelated statute or provision.

This Court has agreed to hear a case concerning the nondelegation doctrine in the upcoming term. *Gundy v. United States*, No. 17-6086 (cert. granted Mar. 5, 2018). Because this case presents that issue in the context of *Chevron* deference, it would also be a good vehicle to consider how the decision in *Gundy* should apply beyond the criminal law.

CONCLUSION

The Ninth Circuit's statutory silence theory significantly changes the nature of this Court's decision in *Chevron*, conflicts with the decisions of four other circuits, and exacerbates existing concerns about *Chevron*'s effect on the Constitution's separation of powers. As this case demonstrates, agency claims to power based on statutory silence invite agencies to circumvent mandatory obligations imposed by statute and undermine Congress's ability to check administrative power. For these reasons, the petition should be granted and the decision below reversed.

DATED: May, 2018.

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FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CALIFORNIA SEA URCHIN COMMISSION; CALIFORNIA ABALONE ASSOCIATION; COMMERCIAL FISHERMEN OF SANTA BARBARA, *Plaintiffs-Appellants,* v. MICHAEL BEAN, in his official capacity as Acting Assistant Secretary for Fish & Wildlife & Parks, Department of Interior; DEPARTMENT OF INTERIOR; DANIEL M. ASHE, in his official capacity as Director of the United States Fish & Wildlife Service; UNITED STATES FISH & WILDLIFE SERVICE, *Defendants-Appellees,* and CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; ENVIRONMENTAL DEFENSE CENTER; FRIENDS OF THE SEA OTTER; HUMANE SOCIETY OF THE UNITED STATES; LOS ANGELES WATERKEEPER; THE OTTER PROJECT, *Intervenor-Defendants-Appellees.*	No. 15-56672 D.C. No. 2:14-cv-08499-JFW-CW

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

CALIFORNIA SEA URCHIN COMMISSION; CALIFORNIA ABALONE ASSOCIATION; CALIFORNIA LOBSTER AND TRAP FISHERMEN'S ASSOCIATION; COMMERCIAL FISHERMEN OF SANTA BARBARA, *Plaintiffs-Appellants,* v. RACHEL JACOBSON, in her official capacity as Acting Assistant Secretary for Fish and Wildlife & Parks, Department of Interior; U.S. DEPARTMENT OF THE INTERIOR; DANIEL M. ASHE, in his official capacity as Director of the United States Fish and Wildlife Service; UNITED STATES FISH AND WILDLIFE SERVICE, *Defendants-Appellees,* FRIENDS OF THE SEA OTTER; HUMANE SOCIETY OF THE UNITED STATES; DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; THE OTTER PROJECT; ENVIRONMENTAL DEFENSE CENTER; LOS ANGELES WATERKEEPER, *Intervenor-Defendants-Appellees.*	No. 17-55428 D.C. No. 2:13-cv-05517-DMG-CW OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted December 4, 2017
Pasadena, California

Filed March 1, 2018

Before: Kim McLane Wardlaw and Ronald M. Gould, Circuit Judges, and Lawrence L. Piersol,*
District Judge

Opinion by Judge Gould

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Andrea A. Treece (argued) and Irene V. Gutierrez, Earthjustice, San Francisco, California; Margaret M. Hall (argued) and Linda Krop, Environmental

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* The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota, sitting by designation.

Defense Center, Santa Barbara, California; for Intervenor-Defendants-Appellees.

OPINION

GOULD, Circuit Judge:

In these consolidated cases, several fishing industry groups challenge the U.S. Fish and Wildlife Service's ("Service") decision to end a 1987 sea otter translocation program. The program was established under discretionary authority granted by Congress in 1986 to create an experimental reserve population of southern sea otters some distance from the main population. If the Service exercised its discretion to establish the program, Public Law 99-625 required the creation of a management zone surrounding the experimental population in which liability under the Marine Mammal Protection Act and Endangered Species Act would be relaxed. The law also required the Service to use "feasible non-lethal means" to remove wayward sea otters from this management zone. As part of its 1987 rule establishing the experimental translocation program, the Service adopted specific criteria by which the program would be deemed a failure and terminated. In 2012, the Service determined that the failure conditions had been met and it ended the program. The fishing industry groups sued in two separate federal district court cases, alleging that the Service exceeded its statutory authority by terminating the program. Both district courts held that the Service's interpretation of the statute as allowing the failed program to be terminated was reasonable, and under the *Chevron*

doctrine upheld the Service's decision to end the translocation program. We affirm.

I

The southern sea otter, or California sea otter, was hunted to near extinction in the 1700s and 1800s for its fur, and was listed as an endangered species in 1977 under the Endangered Species Act ("ESA"). *Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1047 (9th Cir. 2016). In 1982 the Service prepared a recovery plan for the sea otter. Under the plan a new colony would be created far enough away from the parent population so that an environmental catastrophe like an oil spill would not endanger the entire species. *Id.*; 52 Fed. Reg. 29,754 (Aug. 11, 1987). Concerned with whether it had sufficient authority to carry out the plan, the Service asked Congress to extend its powers. In 1986 a responsive Congress passed Public Law 99-625, which clearly authorized the Service's implementation of its plan for the relocation and management of otters. *Cal. Sea Urchin Comm'n*, 828 F.3d at 1047. The correct interpretation of this law is the subject of this litigation and the appeals before us.

The relevant parts of Public Law 99-625 are set forth below:

Section 1(b) states:

> PLAN SPECIFICATIONS. — The Secretary may develop and implement, in accordance with this section, 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. The plan, which must be developed by regulation and administered by the Service in cooperation

with the appropriate State agency, shall include the following:

(1) The number, age, and sex of sea otters proposed to be relocated.

(2) The manner in which the sea otters will be captured, translocated, released, monitored, and protected.

(3) The specification of a zone (hereinafter referred to as the "translocation zone") to which the experimental population will be relocated. The zone must have appropriate characteristics for furthering the conservation of the species.

(4) The specification of a zone (hereinafter referred to as the "management zone") that —

(A) surrounds the translocation zone; and

(B) does not include the existing range of the parent population or adjacent range where expansion is necessary for the recovery of the species.

The purpose of the management zone is to (i) facilitate the management of sea otters and the containment of the experimental population within the translocation zone, and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone by the

experimental population. Any sea otter found within the management zone shall be treated as a member of the experimental population. The Service shall use all feasible non-lethal means and measures to capture any sea otter found within the management zone and return it to either the translocation zone or to the range of the parent population.

(5) Measures, including an adequate funding mechanism, to isolate and contain the experimental population.

(6) A description of the relationship of the implementation of the plan to the status of the species under the Act and to determinations of the Secretary under section 7 of the Act.

Section 1(c)(2) states:

For purposes of section 7 of the Act, any member of the experimental population shall be treated while within the management zone as a member of a species that is proposed to be listed under section 4 of the Act. Section 9 of the Act applies to members of the experimental population; except 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 Act or the Marine Mammal Protection Act of 1972.

Section 1(d) states:

IMPLEMENTATION OF PLAN. — The Secretary shall implement the plan developed under subsection (b)—

> (1) after the Secretary provides an opinion under section 7(b) of the Act regarding each prospective action for which consultation was initiated by a Federal agency or requested by a prospective permit or license applicant before April 1, 1986; or
>
> (2) if no consultation under section 7(a)(2) or (3) regarding any prospective action is initiated or requested by April 1, 1986, at any time after that date.

In 1987, under the authority granted by Public Law 99-625, the Service adopted a final rule implementing the translocation program and designating San Nicolas Island as the home for the experimental population. 52 Fed. Reg. 29,754 (Aug. 11, 1987). The fishing industry was opposed to the translocation program because sea otters prey on commercially valuable shellfish populations, and because the industry could face liability under the Marine Mammal Protection Act ("MMPA") and the ESA for incidental takes of southern sea otters. *Cal. Sea Urchin Comm'n*, 828 F.3d at 1047. Because of these concerns, Public Law 99-625 required the Service to adopt a management zone surrounding the experimental population in which fishermen who incidentally harmed otters would be exempt from liability under the MMPA and ESA. 52 Fed. Reg. 29,787 (Aug. 11, 1987). Public Law 99-625 also required the Service to use "feasible non-lethal means" to capture and remove otters from the management zone "to prevent, to the maximum extent feasible, conflict with other fishery resources." Public Law 99-625 § (1)(b). The Service adopted a

management zone that extended north to Point Conception, west by northwest of Santa Barbara. 52 Fed. Reg. 29,782 (Aug. 11, 1987).

The 1987 final rule, however, recognized that the experimental population might not thrive, and that the purpose of the translocation program might not be realized. For that reason, the 1987 final rule included five specific "failure conditions," any one of which would be a basis for ending the program, including its management zone liability exemptions and the Service's attempts to use feasible nonlethal means to remove otters from the management zone. 52 Fed. Reg. 29,784 (Aug. 11, 1987).

Unfortunately, the San Nicolas population never took off and there never developed a viable independent colony that could continue if an oil spill or other environmental disaster were to threaten the main colony. A 2012 assessment put the population at about fifty otters, a number insufficient to achieve the program's purpose. 77 Fed. Reg. 75,278 (Dec. 19, 2012). In 2009, Friends of the Sea Otter and other environmental organizations sued the Service for unreasonable delay in terminating the translocation program. *Cal. Sea Urchin Comm'n*, 828 F.3d at 1048. The parties reached a settlement requiring the Service to issue a final decision on program termination by the end of 2012. *Id.* That year, the Service determined that one of the failure conditions in the 1987 rule had been satisfied, and it ended the program, thereby eliminating any exemptions from incidental take liability and any future capture and release activities. 77 Fed. Reg. 75,266 (Dec. 19, 2012).

II

The California Sea Urchin Commission and several fishing industry groups ("the plaintiffs") first filed a suit in July 2013 challenging the Service's 2012 decision to terminate the relocation program. In March of 2014, the district court dismissed the plaintiffs claim as untimely. *Cal. Sea Urchin Comm'n v. Jacobson*, No. CV 13-05517, 2014 U.S. Dist. LEXIS 34445, at *26 (C.D. Cal. Mar. 3, 2014). That decision was appealed, and in July 2016, we reversed and remanded, holding that the time to challenge the agency action ran from the 2012 decision to end the program rather than from the 1987 adoption of the failure conditions. *Cal. Sea Urchin Comm'n*, 828 F.3d at 1052. On remand, the district court found that the plaintiffs had standing, but that at *Chevron* step two the Service's interpretation of the statute was reasonable. *Cal. Sea Urchin Comm'n v. Bean*, 239 F. Supp. 3d 1200, 1209 (C.D. Cal. 2017). The court thus granted the Service's motion for summary judgment. *Id.* at 1210.

While the prior appeal of the original case was pending, the plaintiffs petitioned the Department of the Interior and the Service to rescind the portions of the 1987 regulation establishing failure criteria, and the 2012 rule terminating the translocation program. The Service denied the petition, and the plaintiffs brought a new suit. In September 2015, a different district court granted summary judgment for the Service, both on grounds that the plaintiffs lacked standing, and on grounds that the Service's interpretation of the statute was reasonable at *Chevron* step two. *Cal. Sea Urchin Comm'n v. Bean*,

No. CV 14-8499, 2015 U.S. Dist. LEXIS 136453, at *18, *31 (C.D. Cal. Sept. 18, 2015).

In both of these consolidated cases we are asked to address two questions: whether the plaintiffs have standing, and whether the Service's decisions to terminate the translocation program was allowed under Public Law 99-625.

III

We review a grant of summary judgment and rulings on standing and statutory interpretation *de novo*. *Phoenix Mem'l Hosp. v. Sebelius*, 622 F.3d 1219, 1224 (9th Cir. 2010); *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018). Under the Administrative Procedure Act, an agency decision will be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001) (internal quotation marks omitted). But, on questions of statutory interpretation we apply the deferential two-step test set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

IV

In order to have standing, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

Here, the plaintiffs present two different theories of standing. First, they contend that they have standing because of the potential liability that they face due to the elimination of exemptions for incidental takes in the management zone. Second, they argue that they have standing because the otters prey on commercially valuable shellfish, thereby harming their business interests.

A

The plaintiffs' first theory—that they face an increased risk of liability because of the elimination of exemptions for incidental takes in the management zone—fails because it does not allege a concrete and particularized harm. We have held that to show a concrete and particularized harm a plaintiff must do more than allege a potential risk of prosecution. A plaintiff must show that there is a "genuine threat of imminent prosecution." *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 773 (9th Cir. 2006) (quoting *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996)). In assessing whether a threat of prosecution is "genuine," courts considers three factors: (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under the challenged statute." *Id.* (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000)).

Here, the plaintiffs offer declarations from persons working in the fishing industry. At bottom, however, these declarations do not point to any concrete degree of risk, or show that liability is likely.

They do not allege that the Service has issued any warning or threat, nor do they allege any past prosecutions for incidental takes of southern sea otters. This is not enough to establish a "genuine" threat of prosecution.

The plaintiffs also offer a different line of argument for why the threat of prosecution is enough to grant them standing. Specifically, they claim that they have standing as the objects of regulation. And they claim that the object of a regulation is presumed to have standing. In support of this claim they cite *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 655 (9th Cir. 2011) and *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967). These cases, however, do not support the plaintiffs' broad conclusion. In both cases, the challenged regulation imposed a clear burden on the plaintiff. In *L.A. Haven Hospice*, a hospital was required to repay $2.3 million it had received in excess of the annual cap on reimbursement for hospice care. 638 F.3d at 649. In *Abbott Labs*, the agency imposed specific labeling requirements on drug manufacturers. 387 U.S. at 138. The Supreme Court held that the plaintiffs had standing because the regulation was "directed at them in particular," and "require[d] them to make significant changes in their everyday business practices." *Id.* at 154.

Here, in contrast, the regulations do not require any particular change in the fishing industry's practices. And the plaintiffs have pointed to no specific cost that they must bear because of the increased risk of liability for incidental takes of otters. Properly understood, *L.A. Haven* and *Abbot Labs* do not create an exception to the requirement that a party for standing must show a concrete and particularized

injury, or the rule that mere fear of prosecution is not enough for standing. Rather, these cases simply demonstrate that where an agency imposes concrete and particular burdensome requirements on a party—e.g. paying over $2.3 million dollars, or adopting specific labeling requirements—a party will have standing.

B

The plaintiffs' second theory of standing is based on the harms they suffer because of sea otter predation of shellfish. Here the plaintiffs have alleged a concrete and particularized harm. For instance, one declarant states that sea otter predation has significantly reduced shellfish populations between Point Conception and Santa Barbara (an area within the management zone). Another alleges that otters have substantially reduced the shellfish populations between Gaviota and Government Point (also within the management zone).

The Service contends that the plaintiffs lack standing because the harm to shellfish populations will not be redressed by the relief sought. At most, it claims, a favorable decision for the plaintiffs would require the Service to revisit its independent decision in 1993 to cease capture and release operations because there were no feasible non-lethal means to remove sea otters from the management zone. *See* 77 Fed. Reg. 75,269 (Dec. 19, 2012); Public Law No. 99-625, § (1)(b). And the Service contends that it is likely to come to the same conclusion if it reconsiders that decision. We have held that in order to have standing a plaintiff need not show that the requested relief will inevitably alleviate the harm complained of. Where 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. *See Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012). Here, if the translocation program is reinstated, one substantial legal roadblock will be removed. We hold that the plaintiffs have standing based on the alleged harm to shellfish populations.

V

On the merits, we consider whether the Service acted lawfully in terminating the translocation program in 2012. The plaintiffs contend that the Service's creation of the management zone, its obligation to use feasible non-lethal means to remove otters from the management zone, and the exemption from incidental take liability within the management zone became mandatory once the relocation project was started; having started the program, the Service had no authority to end it. Under the plaintiff's theory the program would have to go on forever absent new congressional action. We disagree. For the reasons explained below, we hold that the Service's decision to terminate the program was based on a reasonable interpretation of the statute, and was therefore lawful.[1] We affirm both district court decisions on the merits.

A

In its 1987 regulations implementing Public Law 99-625, the Service specified several "failure" conditions for the program. These failure conditions set criteria for assessing when the relocation program

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[1] The parties do not challenge the Service's determination that the failure conditions were satisfied.

would be deemed unsuccessful and terminated. Under the regulations, if a failure determination was made the Service would terminate the experimental population (i.e. end the program), make reasonable efforts to capture healthy otters remaining in the translocation zone and management zone, and return them to the parent population. 52 Fed. Reg. 29,784 (Aug. 11, 1987).

At issue is whether the Service's decision to terminate the program exceeded the authority given to it under Public Law 99-625. All parties agree that this question should be assessed under the two-step *Chevron* analysis. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-44 (1984). Under that test a court first asks whether Congress has spoken to the precise question at issue. If so, that is the end of the matter. *Id.* at 842-43. Otherwise, the court asks whether the agency's interpretation of the statute is a permissible. *Id.* at 843. "An agency interpretation that enjoys *Chevron* status must be upheld if it is based on a reasonable construction of the statute." *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1143 (9th Cir. 2007).

The plaintiffs contend that the statutory language clearly speaks to the issue at hand, and is unambiguous. They claim that Public Law 99-625 gives the Service discretion in deciding whether to implement the program, but once implemented requires the Service to maintain the program's features indefinitely, including the management zone, removal of otters from that area, and exemption from liability for incidental takes of southern sea otters in the area. In support of this conclusion, they point to some scattered mandatory language in the statute.

Section 1(b) of Public Law 99-625 says that the translocation plan "shall include" a specified management zone. And section 1(d) says that the Secretary "shall implement" the plan after providing an opinion under section 7(b) of the ESA that addresses consultations initiated before April 1, 1986, or if no such consultations are initiated, at any time thereafter. This mandatory language, the plaintiffs claim, requires the conclusion that the program cannot be terminated once it has been instituted.

In contrast, the Service counters that the statute gives it discretion to develop and implement the plan, and that the plan is styled as "experimental." *See* Public Law 99-625 § 1(b). The Service also notes that the statute provides broad discretion to prescribe the specifics of the plan. For example, it lets the Service determine how many otters would be relocated, what area would be appropriate as a management zone and what additional policies to adopt as a result of notice and comment rulemaking. *Id.* These discretionary provisions, the Service argues, support the conclusion that the Service has clear statutory authority to terminate the program. Hence, it contends that its interpretation is compelled at *Chevron* step one.

Public Law 99-625, however, does not either expressly require the Service to operate the translocation program in perpetuity or expressly grant authority to the Service to terminate the program. It does not speak to the issue of termination at all. Because "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

At *Chevron* step two we hold 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. The statute itself makes repeated references to the ESA. For instance, Public Law 99-625 tells the Secretary to include, as part of a plan, a "description of the relationship of the implementation of the plan to the status of the species under [the ESA] and to determinations of the Secretary under section 7 of [the ESA]." Public Law 99-625 § 1(b)(6). Section 7 of the ESA requires the Secretary to ensure that agency actions are in harmony with the protection of endangered and threatened species. 16 U.S.C § 1536. Given this language, it is reasonable for the Service to interpret the provisions of Public Law 99-625 as authorizing it to act in harmony with the goals of the ESA. Terminating the failed translocation program is in keeping with this authority. The plaintiffs' interpretation, by contrast, would require the program to continue even if the Service determined that it was counter-productive and harmed, rather than protected, threatened or endangered species. That would make no sense whatsoever.

Moreover, the statutory language suggests that the purpose of the management zone was to limit conflict between the fishing industry and the translocated otters around San Nicolas Island. The zone was not intended to limit expansion of the northern parent population. *See* Public Law 99-625 § 1(b) ("The purpose of the management zone is to (i) facilitate the management of sea otters and the containment of the *experimental population within the*

translocation zone, and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone *by the experimental population*." (emphasis added)). In light of the statute's focus on the experimental population, it is reasonable for the Service to end the program once it has determined that the San Nicolas population has failed and that continuing the program now would pose a threat to the currently expanded parent population. On the plaintiff's 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. That reading would have the effect of turning a statute with an express purpose of protecting otters into one that harmed otter populations where, as here, the range of the parent population has expanded. And that interpretation cannot be squared with the statute's stated purpose of containing the *experimental* population.

The plaintiffs interpret the Service as defending the 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. Nothing requires us to adopt this broader principle, and we are skeptical that such a principle would be sound. Rather, we hold only that in the circumstances here, where the agency has discretion 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. And it follows with stronger logic that termination is permissible at the agency's discretion if the agency concludes that continuing the

program would undermine the stated purpose of the statute that authorizes it.

In light of the expressly stated goals of Public Law 99-625, it is reasonable to interpret the "mandatory" language in the statute as conditioned on an ongoing successful translocation program. The Service did not violate its statutory duties by terminating the program. The plaintiffs' alternative reading would turn a statute aimed at preservation of the otter population into one that impedes that goal where the experimental population does not thrive. We hold that Public Law 99-625 does not require this result.

B

The plaintiffs also argue that the Service's interpretation raises a serious constitutional question and so should be rejected on constitutional avoidance grounds. Specifically, the plaintiffs argue that the statute does not provide any criteria to guide a decision on termination of the program, and that the Service's interpretation would therefore violate the non-delegation doctrine. We reject this argument because it is unconvincing. As the Supreme Court held in *Whitman v. American Trucking Associations*, to survive constitutional scrutiny under the non-delegation doctrine a statute need provide only an intelligible principle for promulgating associated regulations. 531 U.S. 457, 472 (2001). And as the *Whitman* court explained, an intelligible principle can still be somewhat vague without offending the Constitution. *Id.* at 473-74 (citing cases). Here, Congress has given substantial guidance to the agency. Public Law 99-625 instructs the agency to institute a translocation zone "with appropriate characteristics for furthering the conservation of the

species" and it announces specific purposes for the management zone—to contain otters in the translocation zone and to prevent conflict (to the extent feasible) with fisheries. Public Law 99-625 § 1(b). The statute also instructs the Service to use only feasible non-lethal means to relocate otters. It is evident that the statute has two guiding principles: (1) a concern to protect and preserve a threatened species and (2) a concern to minimize unnecessary conflict with fisheries arising from the experimental population.

The plaintiffs are mistaken in believing that this guidance only relates to the institution of the management zone and that there is no guidance relating to the elimination of that zone once established. The plaintiffs have given no reason to think that these same criteria do not apply equally to both a decision to implement the program and a decision to end it. Looking at the language of the statute and the broader statutory scheme, it is clear that agency decisions regarding both the implementation and termination of a relocation program should be guided by considerations of otter conservation, and avoidance of conflict between the experimental population and fisheries. That is more than enough to pass constitutional muster, and there is no serious constitutional question to avoid here. *See Whitman*, 531 U.S. at 474-75 ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." (citation and internal quotation marks omitted)).

C

The plaintiffs also contend that a 1994 amendment to the Marine Mammal Protection Act relaxing restrictions on incidental takes supports their view. *See* 16 U.S.C. § 1387(a)(4). They argue that this amendment specifically exempts southern sea otters from the relaxed restrictions on grounds that the otters are independently governed by Public Law 99-625. The effect of rescinding the 1987 regulations, they urge, is to make sea otters subject to the baseline MMPA rules, which, the plaintiffs assert, are less lenient with regard to incidental takes. The plaintiffs contend that this could not be allowed under the statutory scheme, since that gives otters more protections than it gives other marine mammals, whereas Public Law 99-625 clearly contemplates that they will have fewer protections, at least within the management zone.

This argument is unconvincing. The termination conditions were established in 1987, seven years before the MMPA's amendment. Hence, Congress was on notice that the agency interpreted Public Law 99-625 to allow termination of the program. Yet Congress left things in place, specifically providing that the amendment "shall not be deemed to amend or repeal [Public Law 99-625]." 16 U.S.C. § 1387(a).

VI

For the reasons set forth above, we affirm both district courts' conclusions that the Service acted lawfully in terminating the southern sea otter relocation program authorized by Public Law 99-625.

AFFIRMED.

Filed 4/18/2018

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA SEA URCHIN COMMISSION; CALIFORNIA ABALONE ASSOCIATION; COMMERCIAL FISHERMEN OF SANTA BARBARA, *Plaintiffs-Appellants,* v. MICHAEL BEAN, in his official capacity as Acting Assistant Secretary for Fish & Wildlife & Parks, Department of Interior; DEPARTMENT OF INTERIOR; DANIEL M. ASHE, in his official capacity as Director of the United States Fish & Wildlife Service; UNITED STATES FISH & WILDLIFE SERVICE, *Defendants-Appellees,* and CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; ENVIRONMENTAL DEFENSE CENTER; FRIENDS OF THE SEA OTTER; HUMANE SOCIETY OF THE UNITED STATES; LOS ANGELES WATERKEEPER; THE OTTER PROJECT, *Intervenor-Defendants-Appellees.*	No. 15-56672 D.C. No. 2:14-cv-08499-JFW-CW

Appendix B-2

CALIFORNIA SEA URCHIN COMMISSION; CALIFORNIA ABALONE ASSOCIATION; CALIFORNIA LOBSTER AND TRAP FISHERMEN'S ASSOCIATION; COMMERCIAL FISHERMEN OF SANTA BARBARA, *Plaintiffs-Appellants,* v. RACHEL JACOBSON, in her official capacity as Acting Assistant Secretary for Fish and Wildlife & Parks, Department of Interior; U.S. DEPARTMENT OF THE INTERIOR; DANIEL M. ASHE, in his official capacity as Director of the United States Fish and Wildlife Service; UNITED STATES FISH AND WILDLIFE SERVICE, *Defendants-Appellees,* FRIENDS OF THE SEA OTTER; HUMANE SOCIETY OF THE UNITED STATES; DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; THE OTTER PROJECT; ENVIRONMENTAL DEFENSE CENTER; LOS ANGELES WATERKEEPER, *Intervenor-Defendants-Appellees.*	No. 17-55428 D.C. No. 2:13-cv-05517-DMG-CW ORDER

Filed April 18, 2018

Before: Kim McLane Wardlaw and Ronald M. Gould, Circuit Judges, and Lawrence L. Piersol,* District Judge.

ORDER

The opinion in the above-captioned matter filed on March 1, 2018, is amended as follows:

At slip opinion page 11, lines 27-30, delete the words <In 2009, Friends of the Sea Otter and other environmental organizations sued the Service for unreasonable delay in terminating the translocation program. *Cal. Sea Urchin Comm'n*, 828 F.3d at 1048.> and replace them with <In 2009, The Otter Project and Environmental Defense Center sued the Service for unreasonable delay in terminating the translocation program.>

At slip opinion page 11, line 32, delete <*Id.*>.

IT IS SO ORDERED.

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* The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota, sitting by designation.

Filed 3/3/2017

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION, et al., Plaintiffs, v. MICHAEL BEAN, in his official capacity as Principal Deputy Assistant Secretary for Fish & Wildlife & Parks, U.S. Department of the Interior, et al., Defendants, and FRIENDS OF THE SEA OTTER, et al., Intervenor-Defendants, and THE OTTER PROJECT, et al., Intervenor-Defendants.	Case No. CV 13-5517-DMG (CWx) **ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT [93, 99, 101]**

Plaintiffs are four trade groups representing fishermen who fish near San Nicolas Island. They ask the Court to hold unlawful and set aside action of the

Fish and Wildlife Service ("FWS") which, among other things, eliminated a regulation immunizing fishermen who accidentally harm California sea otters in this area. Intervenor-Defendants are seven non-profit organizations that share an affinity for marine mustelids. On November 11, 2016, Plaintiffs filed a motion for summary judgment. On December 16, 2016, the FWS and Intervenor-Defendants filed cross-motions.

I. BACKGROUND

The facts and procedural background to this case are set forth at *Cal. Sea Urchin Commission v. Bean*, 828 F.3d 1046, 1047-48 (2016). What follows is a brief summary. In 1986, Congress enacted Public Law No. 99-625, authorizing the FWS to establish an experimental population of California sea otters on San Nicolas Island (the "Translocation Program" or "Program"). In 1987, the FWS promulgated regulations to implement this statute (the "Translocation Plan" or "Plan"). The Plan provided for the termination of the Program in the event one of several termination criteria materialized. In 2012, the FWS terminated the Program and repealed the Plan pursuant to one of these termination criteria. Plaintiffs objected to this action, because it resulted in the repeal of Plan provisions limiting their liability under the Endangered Species Act ("ESA") and Marine Mammal Protection Act ("MMPA"). Plaintiffs filed this suit in 2013, arguing that the FWS's inclusion of termination criteria in the Plan was unlawful.

II. LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where, as here, the parties agree as to the material facts but dispute the proper interpretation of relevant statutes and regulations, the case is properly resolved at the summary judgment stage. *Smith v. Califano*, 597 F.2d 152, 155 n.4 (9th Cir. 1979).

III. ANALYSIS

The only merits issue in this case is whether Public Law No. 99-625 prohibits the FWS from terminating the Translocation Plan. Before turning to that issue, however, the Court must decide whether Plaintiffs have standing to challenge the FWS's decision, and if so, whether their challenge is barred for reasons of issue preclusion or estoppel.[1]

A. Standing

Standing is a "threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). If the plaintiff lacks standing to assert a claim, the Court lacks jurisdiction over the claim. *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). "To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008) (citing *Lujan v. Defs. of Wildlife*,

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[1] The FWS has abandoned its laches argument. [Doc. # 104 at 27 n.18.]

504 U.S. 555, 560-61 (1992)). Because standing is "an indispensable part of the plaintiff's case," the plaintiff must establish standing "with the manner and degree of evidence required at" the relevant stage of the litigation. *Lujan*, 504 U.S. at 561. At the summary judgment stage, the plaintiff "must set forth by affidavit or other evidence specific facts" that, if true, would establish its standing. *Id.* Factual disputes are resolved in the plaintiff's favor. *Id.*

Plaintiffs present two theories of standing. First, Plaintiffs argue that they have standing because they are the objects of the regulations being challenged. A plaintiff is generally presumed to have standing "to seek injunctive relief when it is the direct object of regulatory action challenged as unlawful." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 655 (9th Cir. 2011) (citing *Lujan*, 504 U.S. at 561-62). This is so because there is rarely any doubt that a regulation will have a concrete, immediate effect on the parties subject to regulation. *Id.* Where the regulation's effect on the plaintiff is not self-evident, however, a plaintiff cannot establish standing simply by characterizing itself as a regulated party. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) ("[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement."). Rather, the plaintiff must show that it faces an appreciable risk of incurring liability as a result of the challenged regulation. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967). To determine whether such a risk exists, courts consider three factors: (1) whether the plaintiff has a concrete plan to engage in activities that are likely to result in liability under the challenged law; (2) "whether the prosecuting

authorities have communicated a specific warning or threat to initiate proceedings"; and (3) "the history of past prosecution or enforcement under the challenged statute." *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 773 (9th Cir. 2006).

This is not a case where it is self-evident that Plaintiffs will suffer a concrete, immediate injury as a result of the challenged regulations. The FWS's decision to repeal the Translocation Plan did not impose any regulatory burdens on Plaintiffs. It simply eliminated an exemption from liability under the ESA and MMPA. To show concrete, immediate harm, Plaintiffs must show that they face an appreciable risk of liability due to the elimination of this exemption.

To establish such a risk, Plaintiffs offer six declarations from fishermen who work in the management zone. The declarants generally express their concern about incurring liability under the ESA and MMPA. [*See, e.g.*, Doc. # 93-3, ¶ 8.] One declarant named Michael Harrington states that he has "personally seen sea otters in areas where sea urchin are harvested," and expresses concern that he could be subject to liability if he "accidently disturb[s] . . . or get[s] too near an otter." [Doc. # 93-5, ¶ 24.] Harrington further states that "some types of fishing" cannot be performed in areas where sea otters are present. [*Id.*, ¶ 23].

These declarations do not identify an injury that is "concrete, particularized, and actual or imminent." *Davis*, 554 U.S. at 733. The declarants' generalized concerns about incurring liability do not give rise to a cognizable injury. *See Thomas*, 220 F.3d at 1139. Nor are Harrington's statements sufficiently

particularized to indicate that he has suffered an injury. Harrington does not indicate how many times he has seen sea otters while on the job, how close they were to his work area, or whether he has ever had to leave a fishing site for fear of interfering with the otters. Harrington does not explain which fishing methods are inherently disruptive to otters; nor does he indicate that he uses these methods. Plaintiffs have not presented evidence establishing that they engage in activities that are likely to result in liability if the exemption is not reinstated.[2]

Plaintiffs fail entirely to address the other two *Sacks* factors. They offer no evidence that the government has ever issued a "specific warning or threat" to initiate civil or criminal proceedings against fishermen who accidentally disturb otters.[3] Nor do Plaintiffs present evidence that the ESA or the MMPA have ever been used to prosecute fishermen engaged in the types of activities at issue here. Plaintiffs have not satisfied any of the *Sacks* factors. Their first theory of standing fails.

Plaintiffs' second theory of standing is that the FWS's decision to terminate the Translocation Plan threatens Plaintiffs' interest in robust, sustainable fisheries. Plaintiffs submit declarations from

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[2] FWS, on the other hand, submits evidence suggesting that "[d]ive fisheries (sea urchin, abalone) are extremely unlikely to result in take of sea otters by virtue of the methods they employ to harvest shellfish." [AR 38:5500 (emphasis added).]

[3] As Plaintiffs note, the ESA includes a citizen suit provision, whereby "any person may commence a civil suit on his own behalf . . . to enjoin any person . . . who is alleged to be in violation of" the ESA. 16 U.S.C. § 1540(g). Plaintiffs have not identified any citizens group that has threatened to initiate such an action.

fishermen stating that "[s]ea otters have significantly reduced shellfish populations along the coastline." [*See, e.g.*, Doc. # 93-6 ¶ 5.] One fisherman states that nearly half of his income used to come from harvesting along the coastline, but that he is no longer able to harvest there due to otter predation. [Doc. # 93-7, ¶ 6.] Another fisherman states that otters "decimated" the Coho Anchorage kelp bed, which was once a prime location for sea urchin and shellfish harvesting. [Doc. # 93-6, ¶ 6].

The FWS does not dispute that this evidence establishes cognizable injury-in-fact. Instead, the FWS argues that Plaintiffs cannot establish redressability, because even if Plaintiffs succeed in having the Translocation Plan reinstated, the FWS would not be required to relocate otters unless it identified a "feasible, nonlethal" method for doing so, which is unlikely, as the agency has already determined that no such method exists. Plaintiffs counter that a favorable verdict would at least require the FWS "to make ongoing efforts to develop feasible, nonlethal means of capturing and transporting otters." [Doc. # 103 at 12.]

The Court concludes that Plaintiffs have satisfied the redressability requirement. The redressability requirement does not require a plaintiff "to solve all roadblocks simultaneously;" rather, a party may seek "to tackle one roadblock at a time." *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012). That is especially true when the harm complained of is environmental. Given the complexity of the natural world and the innumerable ways in which human activities affect the environment, it is rarely possible to say with certainty that a particular verdict will

resolve a particular environmental harm. Often, environmental harm will result indirectly from human activity, occurring later in time or some distance away from the activity that caused it, or after some intermediate natural process. *See* Patrick Gallagher, *Environmental Law, Clapper v. Amnesty International, USA and the Vagaries of Injury-in-Fact*, 32 UCLA J. ENVTL. L. & POL'Y 1, 34 (2014) (citing 40 C.F.R. § 1508.8). Environmental harm may also result from "cumulative impacts," i.e., impacts "'which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . .'" *Id.* (quoting 40 C.F.R. § 1508.7).

Rather than shut the courthouse doors to real environmental harms, courts have adopted a practical construction of Article III's case-or-controversy-requirement that allows a plaintiff to maintain an action if it is likely that a favorable verdict will constitute a meaningful step towards remedying the alleged harm. For example, in *American Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652 (7th Cir. 2011), the Seventh Circuit held that an environmental organization had standing to challenge the destruction of the 18.4 acres of wetlands adjoining a state park based on its members' interest in enjoying wildlife at the park. *Id.* at 657. Notwithstanding the small size of the habitat in question, Judge Posner found redressability, explaining that "[i]f a really substantial elimination of wildlife were required to establish standing, a cumulatively immense elimination of wildlife could occur as a result of numerous small projects requiring destruction of wetlands, none of which would create

an injury great enough to support standing if such a requirement were imposed." *Id.* at 660.

Similarly, in *Massachusetts v. EPA,* 549 U.S. 497 (2007), the Supreme Court held that Massachusetts had standing to challenge EPA's denial of a petition for rulemaking which asked the agency to regulate greenhouse gas emissions from new motor vehicles. A favorable verdict would not automatically result in regulation of these emissions; rather, regulation would only occur if the agency made a finding that these emissions "'cause[d], or contribute[d] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Id.* at 532-33 (quoting 42 U.S.C. § 7521(a)(1)). Moreover, even if EPA did ultimately make an endangerment finding and proceed with regulation, this "w[ould] not by itself reverse global warming." *Id.* at 525. Nonetheless, the Court found redressability because the risk of environmental harm "would be reduced to some extent if petitioners received the relief they seek." *Id.* at 526 (emphasis added).[4]

This case is very similar to *Massachusetts*. A favorable verdict for Plaintiffs will not require the FWS to take immediate action to remedy Plaintiffs' injury, but it will require the agency to make an inquiry into whether such action is possible. In *Massachusetts*, a favorable verdict would require EPA

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[4] *Compare Novak v. United States*, 795 F.3d 1012, 1019-20 (9th Cir. 2015) (Plaintiffs may establish redressability by showing "that there would be a change in a legal status as a consequence of a favorable decision and that a practical consequence of that change would amount to a significant increase in the likelihood that [they] would obtain relief that directly redresses the injury suffered.").

to determine whether greenhouse gases endangered public health; here, a favorable verdict would require the FWS to revisit its determination that there is no feasible, non-lethal means of capturing sea otters. The FWS argues that it is likely to come to the same conclusion if it conducts a new inquiry. But if a plaintiff is entitled to insist on certain proceedings, an agency cannot defeat standing by arguing that the outcome of the proceedings is predetermined. *Cf. Lujan*, 504 U.S. 555, 573 n.7 ("one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered").

Accepting Plaintiffs' factual submissions as true, as it must at the summary judgment stage, the Court concludes that reinstatement of the Translocation Plan would constitute a meaningful step towards remedying harm to the fisheries where Plaintiffs fish. Plaintiffs have borne their burden to establish standing.

B. Estoppel

The FWS argues that Plaintiffs are estopped from arguing that the Public Law No. 99-625 prohibits the FWS from terminating the Translocation Plan. The FWS points to the California Abalone Association's comments on the 1987 Rule, which urged the FWS to include termination criteria in the Translocation Plan. The FWS also points to a consent decree signed in 2010 by California Abalone Association and California Sea Urchin Commission, which required

the FWS to carry out a rulemaking applying the termination criteria.

Even assuming California Abalone Association and California Sea Urchin Commission are estopped from arguing that the termination criteria are invalid, there are two other Plaintiffs in this case—California Lobster and Trap Fishermen's Association and Commercial Fishermen of Santa Barbara. The FWS does not explain why these Plaintiffs should be estopped from arguing that the termination criteria are invalid.[5] Because the FWS's estoppel argument would not be dispositive as to all of the Plaintiffs, the Court declines to address it.

C. Issue Preclusion

On February 13, 2017, the Court ordered supplemental briefing on whether Hon. John F. Walter's decision in Case No. CV14-8499-JFW (CWx) had issue preclusive effect in this case. [Doc. # 106.] Among other arguments, Plaintiffs assert that issue preclusion does not apply because one of the Plaintiffs in this case, the California Lobster and Trap Fishermen's Association, was not a party to the proceeding before Judge Walter. Plaintiffs have not provided any evidence to support this organization's standing, and even if the organization has standing, preclusion might lie if a unity of interests exists between California Lobster and Trap Fishermen's Association and the other Plaintiffs. *See United States v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008).

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[5] Although Plaintiffs have not proffered evidence that California Lobster and Trap Fishermen's Association has standing, they have submitted a standing declaration from a member of the Commercial Fishermen of Santa Barbara. [Doc. # 93-5].

Nonetheless, the Court concludes that the better course is to address the merits of this dispute, relying on Judge Walter's decision merely as persuasive authority.

D. Merits of Plaintiffs' Claim

In an action under the Administrative Procedure Act, a reviewing court must "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations . . . ." 5 U.S.C. § 706(2)(C). In deciding whether an agency action is *ultra vires*, courts apply the framework set forth in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013) ("a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority"). At step one, the Court employs the traditional tools of statutory construction to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842 & n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. When the statute is silent or ambiguous with respect to the question at hand, the Court will defer to the agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843.

In pertinent part, Public Law No. 99-625 provides:

> The Secretary may develop and implement, in accordance with this section, 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. The plan, which must be developed by regulation and administered by the Service in cooperation with the appropriate State agency, shall include the following. . . (4) The specification of a zone (hereinafter referred to as the "management zone") that—(A) surrounds the translocation zone; and (B) does not include the existing range of the parent population or adjacent range where expansion is necessary for the recovery of the species.
>
> The purpose of the management zone is to (i) facilitate the management of sea otters and the containment of the experimental population within the translocation zone, and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone by the experimental population. Any sea otter found within the management zone shall be treated as a member of the experimental population. The Service shall use all feasible non-lethal means and measures to capture any sea otter found within the management zone and return it to either the translocation zone or to the range of the parent population.

Public Law No. 99-625, § 1(b).

The dispute in this case arises from the fact that section 1(b) uses both mandatory and permissive language. Plaintiffs focus on the mandatory language, arguing that the FWS is prohibited from terminating the Translocation Plan because the statute provides that the Plan "shall include" a management zone.

[Doc. # 93-1 at 18.] The FWS and Intervenor-Defendants focus on the permissive language, arguing that termination of the Plan is within the FWS's discretion because the statute provides that the agency "*may* develop and *implement*" the Plan. [Doc. ## 99-1 at 30; 101-1 at 20.]

It does not appear to this Court that Congress spoke directly to the question whether the FWS has authority to terminate the Translocation Plan. The language quoted by Plaintiffs does not speak to the question. This language provides that the Plan must include a management zone, but neither requires the FWS to develop the Plan nor prohibits the FWS from repealing the Plan after it is developed.[6]

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[6] Nor do the other passages quoted by Plaintiffs speak to the question at hand. Plaintiffs cite (1) language in section 1(b)(4) stating that the FWS "shall" treat any otter found within the management zone "as a member of the experimental population" and "shall use all feasible non-lethal means and measures" to capture and remove them from the zone; and (2) language in section 1(c)(2) stating that "any incidental taking of [an otter] during the course of an otherwise lawful activity within the management zone[] may not be treated as a violation of" the ESA or MMPA. This language presupposes the existence of an operative Plan establishing a management zone. It does not require the implementation of such a Plan.

Plaintiffs also cite language in section 1(b) stating that the Plan "must be developed by regulation." This language simply specifies the procedure that must be followed in the event the FWS elects to develop the Plan. It does not derogate from the language appearing earlier in the same subsection stating that the FWS "*may* develop" the Plan.

Finally, Plaintiffs cite language in section 1(d) stating that the FWS "shall implement" the regulation after performing any consultations requested or initiated by April 1, 1986, or if no such consultation "is initiated or requested by April 1, 1986, at any

On the other hand, the language quoted by the FWS and Intervenor-Defendants speaks generally to the question at hand. If the FWS "may . . . implement" the Plan, it follows that the agency may also stop implementing the plan.[7] *Accord Cal. Sea Urchin Comm'n v. Bean*, No. 14-8499-JFW (CWx), 2015 WL 5737899 at *6 (Sept. 18, 2015) ("Because implementing the program is discretionary, the Service had the discretion to both commence and cease implementation of the program."). Even so, this language is too general for the Court to comfortably conclude that Congress spoke directly to the question at hand. Absent language directly on point—language stating that the FWS is or is not authorized to terminate the Translocation Plan—the Court is reluctant to resolve this case at *Chevron* step 1.

Turning to *Chevron* step 2, the Court concludes that the FWS's interpretation of Pub. L. No. 99-625 is reasonable. First, the FWS's interpretation is consistent with the presumption that Congress intends for agencies to have flexibility to modify, or if necessary terminate, regulatory programs that have

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time after that date." This language prohibits the FWS from implementing the Translocation Plan before the completion of consultations requested or initiated by April 1, 1986. It cannot be reasonably construed to impose any other limit on the FWS's authority.

[7] Plaintiffs argue that "the phrase 'may develop and implement' pertains only to the Service's discretionary authority to commence the translocation program." [Doc. # 103 at 15.] That argument is unpersuasive. "We must interpret statutes to give effect to all provisions and not render any part surplussage." *United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1247 (9th Cir. 2014). Plaintiffs' interpretation would deprive the term "implement" of any independent meaning.

ceased to serve the intended function. *Accord id.* at *7 (collecting cases). That presumption has special force here, because Congress described the Translocation Program as "experimental," which implies that Congress understood "the program's success [to be] uncertain and its continuation provisional." *Id.*

Second, the FWS's interpretation is consistent with the structure of the statute, which indicates that Congress intended the FWS to have wide discretion in implementing the Plan in general and the management zone in particular. Strikingly, the statute does not establish a minimum size for the management zone. Although the management zone must "surround" the translocation zone, it is entirely up to the FWS how wide the former shall be.[8] Moreover, the statute provides that the management zone is intended to prevent conflict with other fishery resources "to the maximum extent feasible," and that FWS is required to use "feasible non-lethal means" to capture otters found in the management zone. It appears that Congress wanted the FWS to make

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[8] The statute confers an additional measure of discretion by stating that the management zone shall "surround[] the translocation zone[] and . . . not include the existing range of the parent population or adjacent range where expansion is necessary for the recovery of the species." The meaning of the term "adjacent" is indefinite: it is unclear how far one must go from the "range where expansion is necessary" until one is no longer adjacent to that range. The term is also structurally ambiguous, because it could be read to modify "existing range," "translocation zone," or both. Congress' imprecision constitutes a delegation to the FWS to determine what constitutes "adjacent range where expansion is necessary for the recovery of the species." Any range that the FWS determined was necessary for this purpose would, by operation of the statute, be excluded from the management zone.

reasonable efforts to contain the experimental population (if one was established), but intended the agency to have wide discretion in deciding what efforts were feasible and consistent with the recovery of the species. Such discretion was to be constrained, not by congressional fiat, but by the requirement that the FWS proceed by "rulemaking," subject to traditional administrative law protections against arbitrary or capricious rulemaking.

Finally, the FWS's interpretation is supported by the legislative history. The House Report accompanying Public Law No. 99-625 stated that the FWS should look to regulations under section 10(j) of the ESA "for guidance in evaluating the possible effect of the translocation of the parent population." H.R. Rep. 99-124 at 14, 16 (1985). Those regulations provided for "[a] process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species." 49 Fed. Reg. 33,885, 33,893 (Aug. 27, 1984). The FWS's decision to include termination criteria in the Plan follows the direction provided by the House Report.[9]

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[9] Although the Court is reluctant to accord much weight to the statement of a single legislator, it notes that in discussing an earlier draft of the legislation, one of the co-sponsors of Public Law No. 99-625 stated: "[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. H6486 (daily ed., July 29, 1985).

Plaintiffs ask the Court to apply the constitutional avoidance canon to reject the FWS's interpretation, arguing that this interpretation would give rise to non-delegation concerns. The Court declines to do so. "The vitality of the nondelegation doctrine is questionable." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 fn.3 (9th Cir. 1995). If the Supreme Court were thinking about reviving the doctrine, it would not start here. The Translocation Program is of minimal economic significance. Moreover, the FWS's discretion is constrained by the requirement that any action under Public Law No. 99-625 be consistent with the recovery of the species.[10]

In sum, the Court finds that the FWS's construction of Public Law No. 99-625 is a reasonable one and therefore will defer to its interpretation.

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[10] Plaintiffs make an additional argument. They note that Congress amended the MMPA in 1994 to modify the Act's requirements with respect to the "incidental taking of marine mammals in the course of commercial fishing operations," but stated that this amendment would "not govern the incidental taking of California sea otters." 16 U.S.C. § 1387(a)(1), (4). Plaintiffs speculate that Congress exempted California sea otters from this amendment because it expected the management zone established pursuant to Public Law No. 99-625 to remain effective in perpetuity. This argument makes scant sense. The MMPA amendment was enacted five years after the FWS adopted the regulations establishing termination criteria. The Court will not presume that Congress misunderstood these regulations. In any event, Plaintiffs' argument is foreclosed by the plain text of the MMPA amendment, which states that the amendment "shall not be deemed to *amend* or repeal [Public Law No. 99-625]." *Id.* at § 1387(a)(4) (emphasis added).

V. CONCLUSION

In light of the foregoing, the Court will **DENY** Plaintiffs' motion for summary judgment and **GRANT** the FWS's and Intervenor-Defendants' cross-motions.

IT IS SO ORDERED.

DATED: March 3, 2017 s/ Dolly M. Gee

DOLLY M. GEE
UNITED STATES
DISTRICT JUDGE

Filed 3/9/2017

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION, et al., Plaintiffs, v. MICHAEL BEAN, in his official capacity as Principal Deputy Assistant Secretary for Fish & Wildlife & Parks, U.S. Department of the Interior, et al., Defendants, and FRIENDS OF THE SEA OTTER, et al., Intervenor-Defendants, and THE OTTER PROJECT, et al., Intervenor-Defendants.	Case No. CV 13-5517-DMG (CWx) **JUDGMENT**

This Court having granted the cross-motions for summary judgment of Defendants Michael Bean, Daniel M. Ashe, and the U.S. Fish and Wildlife

Service (collectively, "Federal Defendants") and Intervenor-Defendants Center for Biological Diversity, Friends of the Sea Otter, Humane Society of the United States, Defenders of Wildlife, The Otter Project, Environmental Defense Center, and Los Angeles Waterkeeper (collectively, "Intervenor-Defendants") by Order dated March 3, 2017 [Doc. # 113], and having denied the motion for summary judgment of Plaintiffs California Sea Urchin Commission, California Abalone Association, California Lobster and Trap Fishermen's Association, and Commercial Fishermen of Santa Barbara (collectively, "Plaintiffs") by the same Order,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Federal Defendants and Intervenor-Defendants and against Plaintiffs.

IT IS SO ORDERED.

DATED: March 9, 2017 s/ Dolly M. Gee

DOLLY M. GEE
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **CV 14-8499-JFW (CWx)**

Date: September 18, 2015

Title: California Sea Urchin Commission, et al. *-v-* Michael Bean, et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**
ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS):

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [filed 6/17/15; Docket No. 40];

ORDER GRANTING INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [filed 7/10/15; Docket No. 42]; and

ORDER GRANTING FEDERAL DEFENDANTS' CROSS-MOTION FOR

SUMMARY JUDGMENT
[filed 7/10/15; Docket No. 43]

On June 17, 2015, Plaintiffs The California Sea Urchin Commission, California Abalone Association, and Commercial Fishermen of Santa Barbara (collectively, "Plaintiffs") filed a Motion for Summary Judgment. On July 10, 2015, Intervenor-Defendants The Center for Biological Diversity, Environmental Defense Center, Defenders of Wildlife, Friends of the Sea Otter, the Humane Society of the United States, Los Angeles Waterkeeper, and The Otter Project (collectively, "Intervenor Defendants") filed a Motion for Summary Judgment.[1] On July 10, 2015, Defendants Michael Bean, Acting Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of Interior, Dan Ashe, Director of the U.S. Fish and Wildlife Service, and the U.S. Fish and Wildlife Service (collectively, "Federal Defendants") filed a Cross-Motion for Summary Judgment. On August 5, 2015, Plaintiffs filed their Combined Reply and Opposition to Cross-Motions for Summary Judgment. On August 28, 2015, the Federal Defendants and the Intervenor Defendants filed Replies in Support of their Cross-Motions for Summary Judgment.[2] Pursuant to Rule 78 of the Federal Rules of Civil

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[1] The Intervenor Defendants' and Federal Defendants' Motions for Summary Judgment also served as their Opposition to Plaintiffs' Motion for Summary Judgment.

[2] On May 26, 2015, this case was transferred to this Court pursuant to General Order 14-03, Section II(E). On June 8, 2015, this Court filed its Amended Scheduling and Case Management Order (Docket Nos. 38 and 39), and the Court adopted the briefing schedule previously set by Judge Gee in her April 16, 2015 Order Re Amended Schedule (Docket No. 30).

Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's September 21, 2015 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background[3]

The southern sea otter, also called the California sea otter, is listed as a "threatened" species under the Endangered Species Act ("ESA"), due to its vulnerability to extinction from oil spills, environmental contamination, disease, shooting, and entanglement in fishing gear.[4] *See* 42 Fed. Reg. 2,968 (Jan. 14, 1977); 69 Fed. Reg. 5,861, 5,863 (Feb. 6, 2004). As a threatened species, the sea otter is protected by prohibitions on "taking" found in Section 9 of the ESA, which is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §§ 1538(a)(1)(B) and 1532(19). Section 7(a)(2) of the ESA provides that each federal agency

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[3] Although the Court provides a brief factual and procedural history of this case and the plight of the southern sea otters, a more detailed discussion of the facts can be found in *The Otter Project v. Salazar*, 712 F.Supp. 2d 999 (N.D. Cal. 2010), and the March 3, 2014 Order Granting Defendants' Motion to Dismiss in *California Sea Urchin v. Jacobson*, Case No. CV 13-5517 DMG (CWx).

[4] The ESA was enacted by Congress "to provide a means whereby the ecosystem upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b).

must, in consultation with either the U.S. Fish and Wildlife Service (the "Service") or the National Marine Fisheries Service, insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of a threatened or endangered species.[5] 16 U.S.C. § 1536(a)(2). The sea otter is also protected under the Marine Mammal Protection Act ("MMPA"), which, among other things, imposes a moratorium on the taking of marine mammals. 16 U.S.C. § 1362(13).

The Service's 1982 Southern Sea Otter Recovery Plan, developed pursuant to ESA Section 4(f), recommended the establishment of a translocated population of sea otters remote from the main population, to help assure that the entire species would not be wiped out by a single catastrophic oil spill. AR 1:0038. However, additional legislative authority was needed to accomplish this objective, in part because implementing such a program would likely run afoul of MMPA take prohibitions. *See* 77 Fed. Reg. 75,266, 75,268 (Dec. 19, 2012). In response, Congress passed Public Law No. 99-625, 100 Stat. 3500 (1986) ("P.L. 99-625"), expressly authorizing the Service to develop and implement such a program. In order to reduce the potential conflicts between translocated sea otters and activities such as fishing and military activities, P.L. 99-625 provided that such a program should include a "translocation zone" and a "management zone." *Id.*, § 1(b). Within the

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[5] Depending on the species in question, the "Secretary" referred to in the ESA may be the Secretary of the Interior or the Secretary of Commerce. 16 U.S.C. § 1532(15). The Secretary of the Interior has jurisdiction over the southern sea otter, and the Service is the agency within the Department of the Interior with delegated responsibility for administering the ESA.

"translocation zone" surrounding the new sea otter colony, standard MMPA and ESA take prohibitions would apply to all activities (except for defense related activities carried out by the military). *Id.*, § 1(c)(1). Surrounding the translocation zone would be a "management zone," in which the Service was to "use all feasible non-lethal means and measures to capture any sea otter" and "return it to either the translocation zone or to the range of the parent population." P.L. 99-625, § 1(b)(4). The taking of sea otters within the management zone that was incidental to otherwise lawful activities ("incidental take") would be exempt from the ESA and MMPA take prohibitions. *Id.*, § 1(c)(2).

The Service exercised its discretion and implemented a translocation program, and issued regulations which identified San Nicolas Island as the site of the translocated population. 52 Fed. Reg. 29,754 (Aug. 11, 1987) (codified at 50 C.F.R. § 17.84(d)) ("1987 Final Rule"). All U.S. waters south of Point Conception to the U.S.-Mexico border were designated as the management zone. 52 Fed. Reg. at 29,782. The 1987 Final Rule included scientific criteria under which the program would be evaluated and discontinued if it was determined to have failed. *Id.* at 29,784.

The translocation program was plagued with difficulties, including unexpectedly high levels of deaths and disappearances of translocated otters, and slow growth of the new colony. 66 Fed. Reg. 6,649, 6,650 (Jan. 22, 2001); 53 Fed. Reg. 37,577 (Sept. 27, 1988); *see also* AR 37:5625-37. As a result, in 1991, the Service halted translocation efforts, and, in 1993, suspended the capture and removal of sea otters from

the management zone. *See* 77 Fed. Reg. at 75,269. In 1998, large numbers of sea otters, as many as 100 at a time, began moving seasonally into and out of the management zone. *Id.* In 2000, the Service issued a biological opinion under ESA Section 7, concluding that resumed containment of the sea otters would harm the parent population by restricting needed range expansion and disrupting its social structure. AR 26:3488-3537. The biological opinion concluded that resumption of containment was likely to jeopardize the species, in violation of ESA Section 7. *Id.* In 2003, the Service issued a revised sea otter recovery plan which provided for the discontinuation of the entire translocation program. AR 25:3078-88. In 2010, environmental organizations filed suit under the Administrative Procedure Act ("APA"), alleging that the Service had unreasonably delayed making a formal determination as to whether the sea otter translocation program had failed under the failure criteria established by the 1987 Final Rule.[6] *See The Otter Project v. Salazar*, 712 F.Supp. 2d 999 (N.D. Cal. 2010). Several commercial fishing organizations intervened in *The Otter Project* action, including the plaintiffs herein, California Sea Urchin Commission and California Abalone Association. After the Court held that the Service had, by including a failure criteria in the 1987 Final Rule, evidenced an "intention to bind themselves to make a determination based on those criteria" (*Id.*, p. 1006), the parties entered into a Consent Decree. Pursuant to the Consent Decree, the Service agreed to issue a formal decision applying the failure criteria from the

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[6] There was no challenge to the failure criteria itself, only to the delay in applying it.

1987 Final Rule, and if the failure criteria were met, the Service would initiate rulemaking to terminate the translocation program. In 2012, the Service applied the failure criteria, terminated the otter translocation program, and rescinded the 1987 Final Rule. 77 Fed. Reg. at 75,287 ("2012 Termination Decision").

Plaintiffs disagreed with the 2012 Termination Decision, and, on July 31, 2013, filed suit claiming that the Service lacked any statutory authority under P.L. 99-625 to issue the 1987 Final Rule and its failure criteria under which it had terminated the translocation program. *See Cal. Sea Urchin Commission v. Jacobsen*, Case No. CV 13-5517 DMG (CWx). On March 3, 2014, Judge Gee dismissed that suit as time-barred. On April 24, 2014, Plaintiffs filed a Notice of Appeal, and that appeal is pending before the Ninth Circuit.

On April 24, 2014, Plaintiffs petitioned the Service under the APA, requesting rescission of both the 1987 Final Rule's failure criteria and the 2012 Termination Decision. AR 42:5849-5850. Specifically, the Petition "formally request[s] that the Service rescind the failure criteria in 52 Fed. Reg. 29,754 and the 2012 decision, 77 Fed. Reg. 75,266, providing for the termination of the sea otter management zones and the protections for fishermen and Southern California's fishery that Congress provided in Pub. L. No. 99-625." On July 28, 2014, the Service denied the Petition. AR 69:5925. On November 3, 2014, Plaintiffs filed this action, which challenges that denial of Plaintiffs' Petition.

II. Legal Standard

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct

evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. Discussion

A. Standard of Review

The Court must determine the validity of the Service's decision according to APA section 706, which provides that agency action must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (holding that review of an agency's denial of a petition for rulemaking is "'extremely limited and highly deferential'") (quoting *Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

Generally, an agency action is considered "arbitrary and capricious" if the agency has:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Center for Biological Diversity v. U.S. Fish & Wildlife Service, — F.3d —, 2015 WL 5451484, *7 (9th Cir. Sept. 17, 2015) (internal citations omitted). Courts defer to an agency's interpretation of a statute when Congress has delegated authority to the agency "generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

The Court's analysis of whether the Service's interpretation of its authority under P.L. 99-625 was reasonable is guided by the two-part test set forth in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, the Court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Id.* at 842-43. Second, if the Court finds that the "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. As the Supreme Court has recognized, "[t]he power of an administrative agency to administer a congressionally

created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (quoted in *Chevron*, 467 U.S. at 843). Even where that delegation of authority is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. If the agency's statutory interpretation is reasonable, the court must defer to it. *See INS v. Aguirre–Aguirre*, 526 U.S. 415, 424 (1999).

B. Article III Standing.

Before addressing the Federal Defendants' and Intervenor Defendants' arguments that Plaintiffs' claims fail on the merits, the Court must resolve the Federal Defendants' claim that Plaintiffs lack standing.

1. The Legal Standard for Article III Standing.

To establish standing, Plaintiffs must demonstrate: "(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 654-55 (9th Cir. 2011) ("To invoke the jurisdiction of the federal courts, a plaintiff must demonstrate that it has Article III standing—i.e., that it has suffered an injury-in-fact that is both 'concrete and particularized,' and 'actual

or imminent, not conjectural or hypothetical'; that the injury is 'fairly . . . traceable to the challenged action of the defendant'; and that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision' on the plaintiff's claims for relief); *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008) ("To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling").

Article III standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490 (1975). Hence, "a defect in standing cannot be waived; it must be raised, either by the parties or by the court, whenever it becomes apparent." *U.S. v. AVX Corp.*, 962 F.2d 108, 116 n. 7 (1st Cir. 1992).

The inquiry into Article III standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth*, 422 U.S. at 498 (1975). "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art[icle] III." *Id.*

Beyond the "irreducible constitutional minimum of standing" (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)), the Supreme Court recognizes other prudential limitations on the class of persons who may invoke the courts' decisional remedial powers, including the requirement that a party must assert its

own legal interest as the real party in interest.[7] *Warth*, 422 U.S. at 499. To obtain relief in federal court, a party must meet both the constitutional and prudential requirements for standing. *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1339 (Fed. Cir. 2007); *see also In the Matter of Village Rathskeller, Inc.*, 147 B.R. 665, 668 (S.D.N.Y. 1992) (holding that "[t]he concept of standing subsumes a blend of constitutional requirements and prudential considerations").

2. Plaintiffs Lack Standing.

In their Complaint, Plaintiffs seek the restoration of the sea otter containment measures in the management zone claiming injury due to the sea otters' consumption of large amounts of shellfish that Plaintiffs harvested after the Service ceased removing sea otters from the management zone. *See* Complaint, ¶¶ 3, 6, 7, 56, and 62. However, in their Reply, Plaintiffs take a much different position:

> This case is ultimately about whether individuals who work and recreate in Southern California's waters can be fined and even imprisoned for accidentally harming, harassing, or getting too near a southern sea otter. **That's all.** Ruling for the Plaintiffs (fishermen) wouldn't require the Defendants

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[7] These prudential limitations are self-imposed rules of judicial restraint, and principally concern whether the litigant (1) asserts the rights and interests of a third party and not his or her own, (2) presents a claim arguably failing outside the zone of interests protected by the specific law invoked, or (3) advances abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches. *See In re Newcare Health Corp.* 244 B.R. 167, 170 (1st Cir. BAP 2000).

> (Service) to resume moving otters into Southern California or capturing any that wander into the management zone. Instead, it would only require them to restore an exemption from criminal prosecution under the Endangered Species and Marine Mammal Protection Acts for individuals who incidentally "take" an otter within that zone while engaged in otherwise lawful activities.

Plaintiffs' Reply [Docket No. 44], p. 1 (emphasis added); *see also id.*, p. 17 (stating that Plaintiffs' action "wouldn't require the Service to resume capturing and removing otters that wander into the management zone" and only concerns the incidental take exemptions). Therefore, Plaintiffs concede that any alleged injuries that might result from the diminution of the shellfish stocks caused by the sea otters' consumption of shellfish will not be redressed by their lawsuit. Accordingly, in the absence of such injury, Plaintiffs lack standing.

In addition, Plaintiffs have failed to demonstrate that the absence of incidental take exemptions is "causing them to refrain from pursuing their livelihoods for fear of prosecution for take of otter." Complaint, ¶ 68. *See, e.g.*, *Lujan*, 504 U.S. at 561 (holding that at the summary judgment stage, "the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true") (citation and quotations omitted). Standing based on a fear of prosecution requires a "'genuine threat of imminent prosecution' and not merely an 'imaginary or speculative fear of prosecution.'" *Sacks v. Office of*

Foreign Assets Control, 466 F.3d 764, 772-73 (9th Cir. 2006) (*quoting San Diego Cnty Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996)). A court evaluating such a claim must ascertain that "the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (citation omitted). In this case, Plaintiffs have failed to allege, let alone offered any evidence to demonstrate, any of these elements. *See, e.g.*, *In re Delta Smelt Consol. Cases*, 663 F. Supp. 2d 922, 931 (E.D. Cal. 2009) ("Given that there is no threat of imminent Section 9 enforcement in this case, there is no causal connection between Plaintiffs' injury and the conduct complained of, namely Section 9's application to the coordinated operation of the project."), *aff'd sub nom. San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011).

Because Plaintiffs have failed to demonstrate the required injury in fact to establish Article III standing, their action must be dismissed. Therefore, Plaintiffs' Motion for Summary Judgment is denied, and the Federal Defendants' Motion for Summary Judgment and the Intervenor Defendants' Motion for Summary Judgment are granted.[8]

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[8] Alternatively, even if Plaintiffs had standing, summary judgment would be appropriate because their Petition is facially invalid for several reasons. In the Petition, Plaintiffs requested the Service to "rescind" the "failure criteria" in the 1987 Final Rule, and also to "rescind" the 2012 Termination decision that

C. Plaintiffs' Claim Fails on the Merits

Even assuming that Plaintiffs have standing and filed a valid petition, they cannot prevail on the merits of their claim.

1. The Service's Interpretation of P.L. 99-625 is Supported by the Statute's Plain Language.

In their Complaint, Plaintiffs allege that "[a]lthough Public Law 99-625 provides the Service discretion in whether to commence a translocation program, the Public Law provides no authority to the Service to cease such program once it has been initiated." *See* Complaint, ¶ 72. However, Plaintiffs fail to appreciate that P.L. 99-625 uses purely discretionary language authorizing the program, stating that the Service "may develop and implement, in accordance with this section, a plan for the relocation and management of a population of California sea otters." P.L. 99-625, § 1(b).

Accordingly, it is undisputed that it was within the Service's discretion to determine whether such a program would ever be developed. In addition,

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terminated the management zone. AR 42:5849-5850. The APA allows petitions for "issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). However, Plaintiffs' Petition does not fit any of these categories. In addition, it would be improper for the Service to grant a request to repeal portions of the 1987 Final Rule, which no longer exists because it was repealed in 2012. Moreover, the APA does not provide for partial repeal of a rule. Finally, Plaintiffs' Petition is defective because it fails to meet the requirement that a petition "provide the text of a proposed rule or amendment." 43 C.F.R. § 14.2. Thus, Plaintiffs' Petition was not valid under the APA, and the Service correctly rejected it. AR 69:5925.

Congress granted similar discretion with respect to implementation of a translocation program by including language in P.L. 99-625 stating that the Service "may . . . implement" such a program. Because implementing the program is discretionary, the Service had the discretion to both commence and cease implementation of the program. *See Trout Unlimited v. Lohn*, 559 F.3d 946 fn. 12 (9th Cir. 2009) ("The use of 'may' establishes that any action taken pursuant to this authority is discretionary").

The Service interpreted its authority under P.L. 99-625 in a manner fully consistent with the text of the statute when it adopted the 1987 Final Rule, which included criteria under which the Service could cease the implementation of the program. *See, e.g.*, A.R. 40:5839 (Letter from the Service to the U.S. Navy) ("Public Law 99-625 authorized but did not require the Secretary of the Interior to develop and implement the translocation plan"); *see also* A.R. 30:4193 (Revised Draft Supplemental Environmental Impact Statement (Aug. 2011)) ("Public Law 99-625 authorized translocation program but did not mandate that [the Service] undertake such a program"); A.R. 30:4139 ("[T]he statute allowed the Secretary to establish the program by regulation," and "[t]he rule promulgated by the Secretary to implement Public Law 99-625 includes criteria for evaluating whether the translocation program should be declared a failure"). The discretion to terminate the translocation program necessarily includes termination of its component parts, such as the translocation and management zones. *See* A.R. 40:5839 ("The translocation and management zones are component parts of the translocation plan implemented by the Secretary and were designated by

regulation when the translocation program was put in place").

Accordingly, the Court concludes that the plain language of the statute gave the Service discretion to determine whether a sea otter translocation program would ever be developed. There is nothing in the statute that would suggest that the development of a sea otter program was mandatory or that, if the Service decided to embark on such a program, it would exist indefinitely.

2. The Service's Interpretation is a Permissible Construction of P.L. 99-625.

Even if there was any ambiguity in the statute, the Court concludes that the Service's interpretation represents a "permissible construction." *Chevron*, 467 U.S. at 843 (holding that when an issue is not settled by the plain language of a statute, "the question for the court is whether the agency's answer is based on a permissible construction of the statute"). As discussed above, although the Service had discretion to commence the sea otter translocation project, there is no language in P.L. 99-625 that either prohibits termination or directs the Service to continue the program indefinitely or for any specific length of time. In addition, the statute labeled the translocated sea otter population "experimental," implying that the program's success is uncertain and its continuation provisional. *See* P.L. 99-625 § 1(a)(3) and 1(c).

Moreover, courts routinely hold that where a statute confers discretion as to whether to commence a program, the agency retains discretion to cease implementing such a program if doing so is consistent

with the original Congressional goals. *See, e.g.*, *Pennsylvania v. Lynn*, 501 F.2d 848, 855-56 (D.C. Cir. 1974) (holding that an agency "has the discretion, or indeed the obligation, to suspend the [housing subsidy] programs' operation when [they have] adequate reason to believe that they are not serving Congress's purpose of aiding specific groups in specific ways, or are frustrating the national housing policies applicable to all housing programs"); *Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005) (holding that "this Court agrees with the agency's reasonable interpretation of the word 'may' in §1406, and holds that Congress intended to authorize the BOP to operate a boot camp program but did not intend to require the operation of such a program"); *United State v. McLean*, 2005 WL 2371990, at *1 (D. Or. Sept 27, 2005) (holding that BOP had not exceeded its authority by terminating a federal boot camp program and rejected the argument that the agency's "termination of the Program effectuated a repeal of the statute or otherwise exceeded its statutory authority"); *Herrera v. Riley*, 886 F. Supp. 45 (D.D.C. 1995) (holding that even if the statute that authorized the start of the Migrant Student Record Transfer System had "charged the Secretary [of Education] with an enforceable obligation to ensure continuity in records transfers, . . . the court would have to reject the proposition that such an obligation would provide a basis for this court to order the Secretary to continue a program which Congress has clearly committed to the Secretary's own discretion"). In this case, it would be contrary to the original Congressional goals of P.L. 99-625 of taking action necessary to prevent the extinction of the California sea otter to read the

statute as withholding the discretion to cease that action if it was found to undermine sea otter recovery.

In addition, the Court concludes that the Service's interpretation of P.L. 99-625 is also reasonable in light of the statute's legislative history. *Heppner v. Alyska Pipeline Service Co.*, 665 F.2d 868, 871 (9th Cir. 1981) ("When the meaning of statutory language is unclear, one must look to the legislative history"). The co-sponsor of the legislation, Representative John Breaux, expressly 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." AR 19:1322 (131 Cong. Rec. 20,988 and 20,992 (1985)). Representative Breaux also stated that if "the rule is repealed, the limiting provisions of the act," such as the ESA exemptions in the management zone, "would no longer apply." *Id.* There can be little doubt that the inclusion of failure criteria was in accord with Congress's overarching policy goal, which was to help the Service to implement "[t]he central component of the [1982 Sea Otter Recovery Plan]," which was to establish "one or more populations of sea otters to reduce the likelihood that a single, catastrophic oil spill would jeopardize the species." A.R. 19:1301 and 1308 (H.R. 99-124, at 11 and 18 (1985)); *see also* A.R. 19:1322 (Statement of Rep. Breaux, 131 Cong. Rec. H6468 (daily ed., July 29, 1985)). As a result, based on statements by the sponsors and the purpose of the statute generally, the Court concludes that it was clearly anticipated that the Service would be allowed to specify failure criteria and retain discretion to end the program if it was not successful.

The flexibility and discretion that Congress granted to the Service to develop the translocation program is fully consistent with Section 10(j) of the ESA, which authorizes the Service to establish experimental populations of listed species. *See* 16 U.S.C. § 1539(j). The goal of Section 10(j) of the ESA is "to provide the Secretary flexibility and discretion in managing the reintroduction of endangered species." *See Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1233 (10th Cir. 2000); *see also United States v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998) ("Congress' specific purpose in enacting section 10(j) was to give greater flexibility to the Secretary"). The Service initially proposed translocating sea otters in 1984 under the authority of Section 10(j) of the ESA, but the take prohibitions of the MMPA were an impediment to the Service's experimental translocation plan that P.L. 99-625 was intended to resolve. *See* A.R. 19:1320 (Statement of Rep. Breaux, 131 Cong. Rec. H6468 (daily ed., July 29, 1985); *see also* AR 19:1304 (H.R. Rep. 99-124, at 14 (1985)). In enacting P.L. 99-625, Congress specifically stated that it "intended to allow the Fish and Wildlife Service to use the process they have begun under section 10(j) of the Act." *Id.* Thus, the text of P.L. 99-625 was explicitly modeled on Section 10(j) of the ESA: "In essence, it sets up a special procedure, similar to section 10(j) of the Act, that authorizes the Secretary to develop a plan for the relocation and management of an experimental population of California sea otters." *Id.*

The House Report further states that the sea otter translocation regulations should use existing Section 10(j) regulations "for guidance in evaluating the possible effect of the translocation on the parent

population." AR 19:1306 (H.R. Rep. 99-124, at 16 (1985)). Those Section 10(j) regulations, in turn, specifically state that regulations establishing an experimental population should contain "[a] process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species." 49 Fed. Reg. 33,885, 33,893 (Aug. 27, 1984). Therefore, it is clear Congress intended that such an "experimental" population should be continually monitored and evaluated, and that it should not be blindly implemented if it was a failure or was undermining the original conservation goals.

Plaintiffs argue that the statute contains mandatory language that requires the Service to "implement the statutory protections for the management zone."[9] Plaintiffs' Motion for Summary

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[9] In their Motion for Summary Judgment, Plaintiffs argue for the first time that the Court must adopt their interpretation of P.L. 99-625 to avoid a violation of the nondelegation doctrine. However, despite Plaintiffs' argument to the contrary, the Service's termination of the translocation program was not the byproduct of "unconstrained discretion." Instead, the 2012 Termination Decision was the result of the Service's valid exercise of the authority conferred to it by Congress through P.L. 99-625 to implement a translocation program by regulation, and, thus, meets the "extremely lenient" "intelligible principle" standard required for a statute to avoid violating the nondelegation doctrine. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) (holding that in applying the "intelligible principle" standard to congressional delegations of authority, the Supreme Court "has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives"). In addition, "the Supreme Court has not since 1935 invalidated a statute on delegation grounds." 33 Fed. Prac. &

Judgment, p. 9. However, the management zone provisions are merely features that the Service "shall include" only if the Service chooses to implement the program at all. P.L. 99-625, §1(b). Plaintiffs argue that the words "shall implement" in Section 1(d) of the statute should be interpreted to mean that the Service must, once implementation begins, continue to implement the program. However, when read in context, the words "shall implement" pertain to the timing for commencing implementation. Thus, the Service is required to implement—or "shall implement"—the program only "after" certain ESA consultations on prospective actions that may affect the experimental population. *See Id.*, §§ 1(a)(5) and 1(d). Nothing in the cited language supports Plaintiffs' position that the Service was powerless to terminate the translocation program once it commenced, irrespective of its failure or its actual harm to sea otters.

Moreover, Plaintiffs' interpretation of P.L. 99-625 would lead to an absurd result. Plaintiffs argue that P.L. 99-625 does not allow the Service to cease implementing the sea otter translocation program. However, if Plaintiffs' interpretation was correct, it would mean that P.L. 99-625 would override the Service's mandatory duty under the ESA to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species" (16 U.S.C. § 1536(a)(2)), because

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Proc. Judicial Review § 8365 (1st ed.); *see also Whitman v. Am Trucking Associations*, 531 U.S. 457, 474-75 (2001). Thus, "[t]he vitality of the nondelegation doctrine is questionable." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 fn. 3 (9th Cir. 1995).

the Service would be required to continue with the sea otter translocation program without regard to its impact on the species. Such an absurd result is totally inconsistent with the ESA, the 2003 Recovery Plan for the sea otter, and the purpose of P.L. 99-625, which was to facilitate the conservation and recovery of the species. *See, e.g.*, *United States v. Tatoyan*, 474 F.3d 1174, 1181 (9th Cir. 2007) (a fundamental principle of statutory construction is that "[s]tatutes should be read to avoid . . . absurd results"); *see also Tenn. Valley Authority*, 437 U.S. at 194 (holding that, in enacting the ESA, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities" and the ESA gives endangered "species priority over the 'primary missions' of federal agencies"). Furthermore, Plaintiffs' argument that P.L. 99-625 represented a "compromise between the Service, conservation groups, and industries affected by sea otter expansion," and, thus, termination of the translocation program "would not further Congress' goal of preventing conflict between the otter and other fishery resources" is unpersuasive. *See* Plaintiffs' Motion for Summary Judgment, pp. 12-13. Plaintiffs' argument clearly conflicts with the plain language of P.L. 99-625, which Plaintiffs' have conceded vested with the Service the discretion whether to develop and implement a translocation program at all, and had the Secretary chosen not to develop the program, those conflicts would continue to exist. In addition, the paramount consideration of P.L. 99-625 was to promote the recovery of the sea otter, and mitigation of risks to fishery resources was an important but secondary consideration. *See, e.g.*, 132 Cong. Rec.

33,806 and 33,808 (1986) ("I believe we must go forward with this legislation. We owe it to the California sea otter. Translocation of the California sea otter . . . is an important step toward the protection and restoration of the Southern sea otter within its historic range").

Accordingly, Plaintiffs have failed to demonstrate that the Service lacked the authority to terminate the translocation program as provided in the 2012 Termination Decision. Therefore, Plaintiffs' Motion for Summary Judgment is denied, and the Federal Defendants' Motion for Summary Judgment and the Intervenor Defendants' Motion for Summary Judgment are granted.

IV. Conclusion

For all the foregoing reasons, Plaintiffs' Motion for Summary Judgment is **DENIED**, and the Federal Defendants' Motion for Summary Judgment and the Intervenor Defendants' Motion for Summary Judgment are **GRANTED**. The parties are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before September 23, 2015. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a declaration outlining their objections to the opposing party's version no later than September 23, 2015.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA SEA URCHIN COMMISSION, et al., Plaintiffs v. MICHAEL BEAN, et al., Defendants, And CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Intervenor-Defendants.	CASE NO. 2:14-cv-08499-JFW-CW **JUDGMENT RE: SUMMARY JUDGMENT MOTIONS OF PLAINTIFFS, FEDERAL DEFENDANTS, AND INTERVENOR-DEFENDANTS**

WHEREAS, Plaintiffs the California Sea Urchin Commission, California Abalone Association, and Commercial Fishermen of Santa Barbara (collectively, "Plaintiffs"), submitted on April 24, 2014, a petition for rule-making under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(e) to the U.S. Fish and Wildlife Service and the U.S. Department of the Interior;

WHEREAS, on July 28, 2014, the U.S. Fish and Wildlife Service and the Department of the Interior denied Plaintiffs' rule making petition;

WHEREAS, Plaintiffs filed this action on November 3, 2014, claiming that the denial of Plaintiffs' petition was arbitrary, capricious, not in accordance with law, and in excess of statutory jurisdiction and authority pursuant to the APA, 5 U.S.C. § 706(2)(A), (C);

WHEREAS, Plaintiffs moved for an order granting summary judgment on their claim;

WHEREAS, Defendants Michael Bean, in his official capacity as Acting Assistant Secretary for Fish & Wildlife & Parks, United States Department of the Interior; Daniel M. Ashe, in his official capacity as Director of the United States Fish & Wildlife Service; and the United States Fish & Wildlife Service; moved this Court for an order granting summary judgment on Plaintiffs' claim;

WHEREAS, Intervenors Center for Biological Diversity, Environmental Defense Center, Defenders of Wildlife, Friends of the Sea Otter, Humane Society of the United States, Los Angeles Waterkeeper, and The Otter Project (collectively, "Intervenor-

Defendants"), also moved this Court for an order granting summary judgment on Plaintiffs' claim;

WHEREAS the Court has considered the parties' memoranda of points and authorities, the administrative record of the challenged decision, the statements of uncontroverted facts and conclusions of law, the supporting declarations and evidence submitted therewith, as well as having considered all of the other pleadings, records, and documents filed in this action;

WHEREAS the Court, on September 18, 2015, issued an Order, Docket No. 73, denying Plaintiffs' motion for summary judgment, and granting the motions for summary judgment of Federal Defendants and Intervenor-Defendants ("Summary Judgment Order");

WHEREAS, the Court's Summary Judgment Order concluded that Federal Defendants' denial of the petition was not in violation of the APA, and also concluded that Plaintiffs lacked Article III standing for their claims, and detailed the reasons for these conclusions;

Accordingly, the Court now enters its Final Judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure. Plaintiffs' suit is dismissed with prejudice. Each party shall bear their own fees and costs.

DATED: September 23, 2015

s/ John F. Walter
HONORABLE
JOHN F. WALTER
UNITED STATES
DISTRICT JUDGE