No. 17-1636

In The Supreme Court of the United States

CALIFORNIA SEA URCHIN COMMISSION, et al.,

Petitioners,

v.

SUSAN COMBS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was correct in holding that the United States Fish and Wildlife Service took a permissible view of its authority under Public Law No. 99-625 and the Endangered Species Act when it terminated an experimental relocation program for threatened sea otters after concluding that the program had failed and had become an obstacle to the recovery and survival of the sea otters.

CORPORATE DISCLOSURE

Respondents submitting this Brief in Opposition are Center for Biological Diversity, Defenders of Wildlife, Environmental Defense Center, Friends of the Sea Otter, The Humane Society of the United States, Los Angeles Waterkeeper, and The Otter Project, which intervened as defendants in the district court. Respondents have no parent corporations, and no publicly held company owns any stock in these respondents.

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INTRODUCTION

The decision below does not warrant this Court's review because it involves the straightforward application of sound legal principles to a highly fact-specific dispute. Petitioners mischaracterize the context of this case and the court of appeals' decision, which does not present an important question of federal law. The statute at issue—Public Law 99-625—was enacted for the narrow purpose of enabling the United States Fish and Wildlife Service ("Service") to undertake an effort to conserve and recover the California sea otter. Pub. L. No. 99-625, 100 Stat. 3500 (1986). Under the law, Congress gave the Service the discretionary authority to establish an experimental population of otters, and provided the agency with rulemaking authority to do so. After implementing the experimental program by capturing and relocating otters, the Service determined that the program not only failed to promote sea otter recovery, but actually prevented it. The Service therefore terminated the program pursuant to criteria set forth in the regulations that the statute authorized the agency to promulgate. The court of appeals upheld the agency's interpretation that it may terminate the failed program by applying the analytical steps articulated in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Contrary to Petitioners' assertion, the decision did not rest on a theory of statutory silence. *See* Petition ("Pet.") at 21. Rather, the court concluded that while the law does not speak directly to the duration of the experimental program, the Service's interpretation is

reasonable because it is consistent with the clear language and purpose of Public Law 99-625. Petitioners' attempt to create discord with other decisions is premised on their mischaracterization of this case as one in which the agency acted inconsistently with the underlying statute or faced a statutory void. Here, however, the Service acted pursuant to a clear delegation of rulemaking authority to implement the program, and based its interpretation on a wealth of relevant language in Public Law 99-625. Accordingly, the decision below is squarely in line with relevant decisions of this Court and the decisions of other circuit courts.

Moreover, the outcome of this case does not necessarily hinge on the arguments advanced in the Petition concerning *Chevron* deference. Public Law 99-625 must be read within its overall statutory context; it was enacted to enable the Service to carry out its obligation to recover the California sea otter under the Endangered Species Act ("ESA"). In addition, implementation of the program remained subject to the ESA's prohibition against jeopardizing the species. As the Service ultimately determined, implementing the program would in fact jeopardize otters, which would violate the ESA. In sum, the decision below presents narrow circumstances and does not raise any important legal questions, making this case a poor fit for this Court's review. Therefore, this Court should deny the Petition.

STATEMENT OF THE CASE

I. Genesis of Public Law 99-625

Public Law 99-625 is a unique statute, of limited application and born of very specific circumstances. Congress enacted the law to promote the recovery of the California sea otter, which is protected as a threatened species under the ESA, 16 U.S.C. §§ 1531–44 (1973). The bedrock purpose of the ESA is to ensure not only the survival of threatened and endangered species but also their recovery to the point where they no longer need protection. 16 U.S.C. § 1531(b) (purposes of the ESA include providing a program for the conservation of listed species); *id*. at § 1532(3) (defining "conservation" as the "use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"). Congress developed Public Law 99-625 to enable the Service to implement an experimental program that the agency believed was necessary to conserve the species.

The California sea otter (also called the southern sea otter) once ranged along the entire Western seaboard, until the species' population was decimated by intensive fur hunting in the 18th and 19th centuries. Petition Appendix ("Pet. App.") at A-5. In 1977, the Service listed the species as threatened under the federal ESA, due to its small population size, limited distribution, and continued vulnerability to offshore oil and gas exploration and transportation. Determination

that the Southern Sea Otter Is a Threatened Species, 42 Fed. Reg. 2,965-66 (Jan. 14, 1977). At the time, the California sea otter population numbered fewer than 2,000 animals, all confined to a small stretch of the central California coast. *Id*.

In keeping with its duty to promote recovery of the California sea otter, the Service in 1982 issued a Recovery Plan for the California sea otter pursuant to section 4(f) of the ESA ("Recovery Plan"). 16 U.S.C. § 1533(f); Pet. App. at A-5. In the 1982 Recovery Plan, the Service determined that establishing a second breeding colony of sea otters was necessary to protect the species from extinction and to promote the species' recovery by protecting it from the risk of being "decimated" by an oil spill or other environmental catastrophes. Pet. App. at A-5; Endangered and Threatened Wildlife and Plants; Establishment of an Experimental Population of Southern Sea Otters, 52 Fed. Reg. 29,754, 29,757 (Aug. 11, 1987). To do so, the Service determined it would have to establish a "translocation" program to move otters from the parent population along the central California coast to other areas within the otter's historic range. Preparation of Environmental Impact Statement on Proposal to Translocate Southern Sea Otters, 49 Fed. Reg. 26,313-15 (Jun. 27, 1984).

The Service began to develop the translocation program pursuant to section 10(j) of the ESA, 16 U.S.C. § 1539(j), which governs the way experimental populations of listed species are established and managed. *Id*. Capturing and relocating otters from the parent

population to the experimental location was an essential part of the plan. In the course of developing its plan, the Service identified a potential gap between its authority under ESA section 10(j), which allows the Service to "take" a listed species by capturing and relocating it to establish an experimental population, and the Marine Mammal Protection Act ("MMPA," 16 U.S.C. §§ 1361–1423h (1972)), which did not permit taking marine mammals for that purpose. *See* 145 Cong. Rec. S17320, S17321 (daily ed. Oct. 18, 1986). Both the ESA and MMPA define "take" to include capturing or otherwise disturbing a protected species, and allow take only under certain, proscribed circumstances. 16 U.S.C. § 1372(a) (prohibiting "take" of marine mammal); *id*. § 1362(13), (18) (defining "take" and "harassment" under the MMPA); *id*. § 1532(19) (defining "take" under the ESA); *id*. § 1538(a) (prohibiting "take" of a listed species). Congress responded quickly, recognizing the importance of conserving the California sea otter and the need to remove legal obstacles to doing so. Pet. App. at A-5. Accordingly, Congress enacted Public Law No. 99-625 on November 7, 1986, in order to provide clear authority for the Service's actions. *See* 52 Fed. Reg. at 29,768. The statute placed both the development and implementation of the translocation program within the Service's discretion. Pub. L. No. 99-625, § 1(b) (1986) ("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." (emphasis added)). It explicitly recognized that such a program would be

"experimental" and directed the Service to develop any such program through regulation. *Id*.

The statute provided that the program, if developed, had to include certain elements. Among these elements were: the number, age, and sex of sea otters proposed to be transferred; the specification of the manner in which otters would be translocated and protected; "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 Service] under section 7 of the [ESA]"; specification of a "translocation zone" that "must have appropriate characteristics for furthering the conservation of the species"; and specification of a "management zone" that was to surround the translocation zone and "does not include the existing range of the parent population or adjacent range where expansion is necessary for the recovery of the species." Pub. L. No. 99-625, § 1(b). The statute further specified that the purpose of the management zone itself was to contain the experimental population and "prevent, *to the maximum extent feasible*, conflict with other fishery resources within the management zone *by the experimental population*." *Id*. at § 1(b)(4)(B) (emphasis added). The basic concept of the management zone was to exclude the experimental otter population from the management zone by allowing the Service to remove members of the experimental population that strayed into the management zone. Finally, the statute stated that the Service shall use "non-lethal means and measures" to capture and relocate otters. *Id*.

Public Law 99-625 thus provided explicit direction to the Service regarding the specific elements of the translocation program, should the Service decide to establish one. The statute also made clear that the purpose of the program as a whole was to promote conservation of the California sea otter, while the purpose of one part of the program, the management zone, was to minimize conflicts between the fishing industry and individual members of the experimental population within that zone as much as feasible. The implementation of the program remained subject to the ESA's requirement that the Service ensure that its actions are not likely to jeopardize the species. Pub. L. No. 99-625, § 1(b)(6); 16 U.S.C. § 1536(a)(2).

The Service exercised its authority to initiate rulemaking to develop the translocation program. During the rulemaking process, both wildlife conservation and fishing industry groups (including some of the Petitioners) raised concerns that the experimental program might fail and noted the need for a mechanism to end a failed experiment. In response, the Service included five "Criteria for a Failed Translocation" ("failure criteria") in the final regulation to implement the translocation plan, agreeing that they "are critical to [determining] whether or not the experimental population will achieve its intended purposes or have to be terminated, which would involve Service evaluation and informal rulemaking procedures." 52 Fed. Reg. at 29,764, 29,772. If any one of the failure criteria were met, then "[t]he translocation would generally be considered to have failed," and the Rule would "be

amended to terminate the experimental population." *Id*. The Service promulgated the final regulations on August 11, 1987. Neither the fishing industry nor any other interested entity challenged the inclusion of the failure criteria or the final regulation.

II. The Service's Termination of the Translocation Program After the Experiment Failed and Jeopardized the Species' Recovery

Between August 1987 and March 1990, the Service translocated 140 otters to San Nicolas Island. Endangered and Threatened Wildlife and Plants; Termination of the Southern Sea Otter Translocation Program, 77 Fed. Reg. 75,266, 75,269 (Dec. 12, 2012). It quickly became apparent that the translocation program was not working as intended. Starting in its first year, the Service saw "unexpected mortalities and high emigration" of sea otters involved in the translocation program. *Id*. In 1991, the Service stopped translocating otters to San Nicolas Island "due to high rates of dispersal and poor survival." *Id*. The Service became "concerned that sea otters were dying as a result of [its] containment efforts," and "suspended all sea otter capture activities" in 1993. *Id*.

Over the course of the next two decades, the Service repeatedly revisited the effects of this experiment on the California sea otter as a species, and repeatedly concluded that the experiment had not only failed to promote its purpose—achieving the species' recovery—but was preventing it. One of the unexpected

circumstances the Service discovered was that a significant number of otters that moved into the management zone came from the central California parent population, not the translocated population that Public Law 99-625 sought to contain. 77 Fed. Reg. at 75,284, 75,289. This meant that continued implementation of the management zone would limit natural expansion of the parent population and subject members of that population to unlimited take, contrary to Public Law 99-625's requirement that the management zone not interfere with the otter's natural expansion. Pub. L. No. 99-625, § 1(b). In 2000, the Service completed a new ESA section 7 consultation on the sea otter translocation and management rule, in which it determined that "expansion of the southern sea otter's distribution is essential to the survival and recovery of the species" and that artificially restricting their range to the area north of Point Conception by continuing to implement the translocation program would thwart that necessary expansion. 77 Fed. Reg. at 75,270. The Service thus concluded that "containment of southern sea otters was not consistent with the requirement of the ESA to avoid jeopardy to the species," because it was causing high levels of mortality and impairing the sea otter's ability to recover. *Id*.

In 2003, the Service revised its Recovery Plan and concluded that continued implementation of the translocation program and associated management zone was one of the primary threats to the species. 77 Fed. Reg. at 75,279-80, 75,286-87 (recognizing that enforcement of the management zone would interfere with

natural expansion necessary for recovery). The Service also explained that the management zone violated Public Law 99-625's requirement that the zone not interfere with the California sea otter's natural expansion. *Id*. at 75,286-87.

In 2009, The Otter Project and the Environmental Defense Center sued the Service for unreasonably delaying its implementation of its 2003 revised Recovery Plan. Complaint for Declaratory and Injunctive Relief, *The Otter Project et al. v. Salazar et al*., No. C09-04610-JW (N.D. Cal. Sept. 30, 2009), ECF No. 1. The Otter Project and Environmental Defense Center settled with the Service in November 2010, requiring the Service to finally apply the failure criteria and make a final decision by December 2012 regarding whether the translocation and management program had failed. Stipulated Settlement Agreement and Order of Dismissal, *The Otter Project*, No. C09-04610-JW (N.D. Cal. Nov. 23, 2010), ECF No. 67. Petitioners California Sea Urchin Commission, California Abalone Association, and Commercial Fisherman of Santa Barbara intervened in that litigation and were signatories to the settlement. *Id*. Following a National Environmental Policy Act public process that featured extensive public comment, the Service in 2012 decided to terminate the translocation program. *See* Pet. App. at A-9. The Service concluded that the program had failed to establish a viable new population of sea otters, resulted in the death or disappearance of many translocated otters, violated the ESA by preventing the species' recovery, and violated Public Law 99-625 because the containment

of the sea otters could not be achieved in a non-lethal manner and because maintenance of the "no-otter zone" precluded otter recovery. 77 Fed. Reg. at 75,266-67, 75,284-89.

III. Legal Proceedings Below

Petitioners brought two separate legal challenges to the Service's action. After the District Courts ruled in favor of the Service in each case, Petitioners filed appeals with the Ninth Circuit Court of Appeals. The appeals were consolidated, and the Ninth Circuit Opinion upheld the Service's action. Petitioners argued that the plain language of Public Law 99-625 as well as its legislative history required that the Service implement the management zone portion of the translocation program in perpetuity. Petitioners maintained that this alleged requirement remained in place even after the Service determined that continued implementation of the experimental program prevented the recovery of the California sea otter, contrary to the Service's duty to avoid jeopardizing the species. The Service and Intervenors argued that the Service's interpretation of its authority to terminate the program was fully supported by the plain language of Public Law 99-625, as well as the overarching requirements of the ESA, and was reasonable given the context, purpose, and history of Public Law 99-625.

The court of appeals found that Public Law 99-625 did not explicitly define the duration of the experimental program as either perpetual or temporary. Pet.

App. at A-17. Accordingly, it determined that the statutory language was ambiguous under step one of *Chevron* and proceeded to analyze the relevant statutory language and purpose under *Chevron* step two. The court concluded that the language of Public Law 99-625, as well as its express purpose to promote recovery of the California sea otter, supported the Service's reasonable interpretation that it could terminate the experimental program after it failed to achieve its purpose.

REASONS THE PETITION SHOULD BE DENIED

The Petition fails to demonstrate any compelling reason for this Court to review the court of appeals' decision that the Service had statutory authority to terminate the experimental translocation program after it failed to achieve its purpose and risked jeopardizing the continued existence of the California sea otter. The decision does not raise any important question of federal law or conflict with this Court's rulings or with relevant rulings of any other circuit. *See* U.S. Sup. Ct. Rule 10(a), (c).

The court of appeals proceeded in an entirely unremarkable fashion, first quoting the two-step analysis articulated in *Chevron*, then methodically applying both steps to analyze Public Law 99-625 as a whole and its relationship to the Service's ESA obligations. Petitioners' characterization of the decision as one of

"statutory silence" relies on a single sentence of the court's opinion while ignoring the rest. However much Petitioners may dislike the decision, it is not the product of the novel "statutory silence" theory that Petitioners have developed and attributed to the court of appeals. Rather, the decision was explicitly grounded in the relevant language and purpose of Public Law 99-625. Because the decision below does not rest on a theory of statutory silence, it does not present any conflict with this Court's *Chevron* decision or its progeny, or the decisions of any other circuit courts.

Rather, the decision applies a properly stated rule of law—statutory analysis under *Chevron*—to a statute of singularly narrow application. Public Law 99-625 came into being as a means to give the Service clear authority to translocate otters as part of an experimental program that was aimed at promoting the recovery of one species, the California sea otter, and which affected one region, the ocean waters off southern California. Indeed, the outcome of this case does not even hinge on the *Chevron* issues Petitioners advance because, although the court of appeals decided the case under *Chevron* step two, it need never have reached that step because the Service maintained express authority under the ESA to terminate the translocation program after determining it impaired the California sea otter's survival and recovery.

I. This Case Does Not Present an Important Question of Federal Law.

Petitioners mischaracterize the decision below. The court did not announce or apply a "statutory silence" theory. *See* Pet. at 21. The questions presented in the Petition misstate both the court of appeals opinion and the nature of the case. First, the court *did* base its decision on the text of the statute in question, not on the "absence of relevant text." Pet. at i. Second, Public Law 99-625 *did* explicitly authorize agency action, and thus this is not a case raising a question of "statutory silence." *Id*. Contrary to the assertions in the Petition, the court applied well-established tenets of the *Chevron* doctrine to determine whether the Service's interpretation of Public Law 99-625 was reasonable. There is thus no "important question of federal law" to be settled by this Court. *See* U.S. Sup. Ct. Rule 10(c). Moreover, the Ninth Circuit's straightforward application of law concerns a unique and narrow factual context unworthy of this Court's review.

A. The Court of Appeals Did Not Apply a Statutory Silence Theory.

The Ninth Circuit did not base its decision on there being "*no text* in the statute, ambiguous or otherwise" to support the agency's action. Pet. at 20 (emphasis added). Instead, the court straightforwardly applied the *Chevron* doctrine's two step analysis. At *Chevron* step one, the court of appeals addressed arguments from both sides that the statute is clear, including the Service's argument that its broad discretion to

implement the plan made its power to terminate the plan clear, and Petitioners' argument that the law required the Service to implement the plan indefinitely.[1] Pet. App. at A-17. The court concluded that Public Law 99-625 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." *Id*. The court quoted *Chevron* itself for the well-established principle that, "[b]ecause '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*. (emphasis added) (quoting *Chevron*, 467 U.S. at 843). In so doing, the court of appeals did not, as Petitioners assert, conclude that it would defer to the Service's interpretation based on the absence of any relevant language in the statute. Rather, the court saw ambiguity in the statute based on the lack of any unambiguous direction regarding either termination or indefinite implementation. Concluding that neither parties' interpretation was compelled by the clear language of the law (in other words, that the statute was ambiguous), the court proceeded to *Chevron* step two to determine whether the Service's interpretation was reasonable. That analysis does not

[1] Notably, the Petition for Certiorari is the first place in which Petitioners have advanced a theory that the statute is silent. Throughout the litigation of this case, Petitioners have argued that the statutory language is clear and pointed to the text of Public Law 99-625.

stretch the *Chevron* doctrine in any way because it simply quotes and applies *Chevron* itself.

Underscoring that the court of appeals did not rely on the absence of any statutory support for the agency's position as the basis for its invocation of *Chevron* deference, the court's analysis under *Chevron* step two relies on the abundance of relevant language in Public Law 99-625 that supports the Service's authority to terminate the experimental program. Using that analysis, the court concluded that the Service's decision to terminate the program was reasonable "[i]n light of the *expressly stated* goals of Public Law 99-625." Pet. App. at A-20 (emphasis added). The court further held that "where the agency has the discretion to implement an experimental program, it can reasonably interpret the statute to allow it to terminate the program if the statute's purpose is no longer being served." Pet. App. at A-19. The court pointed to the statute's "repeated references to the ESA," including the requirement that any plan must address the relationship of the plan's implementation to the status of species under the ESA and to determinations made under ESA section 7, which prohibits the agency from taking actions that jeopardize listed species. Pet. App. at A-18 (quoting Pub. L. No. 99-625, § 1(b)(6)). In light of this Congressional directive, the court determined it was "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." *Id*. The court further concluded that terminating the program "is in keeping with this authority," whereas requiring the

Service to continue the program even though it harmed sea otters "would make no sense whatsoever." *Id.*

Moreover, the court highlighted the statute's focus on the "*experimental* population" in concluding that the purpose of the management zone was to reduce conflict between the fishing industry and the experimental population, not to "limit expansion of the northern parent population." Pet. App. at A-18. Therefore, it was reasonable for the Service to end the program once it determined that the experimental program failed, and in fact harmed sea otters as a species. The court concluded that Petitioners' "unwise" reading of the statute "cannot be squared with the statute's stated purpose" and would "have the effect of turning a statute with an *express* purpose of protecting otters into one that harmed otter populations. . . ." Pet. App. at A-19 (emphasis added). The Ninth Circuit's analysis is based firmly on the text of Public Law 99-625—in particular its references to the ESA and its focus on the experimental population.

B. The Service's Action Is Well-Grounded in the Language of Public Law 99-625.

This is not a case in which the statute at issue failed to confer any relevant authority on the agency, and a court nonetheless deferred to the agency's action in the face of such a statutory void. Instead, the statute provided clear guidance, which the Service followed in its implementation of the program. Congress expressly

authorized the Service to implement the plan in section 1(b) of Public Law 99-625 by providing that the Service "*may* develop *and* implement" the plan. Pub. L. No. 99-625, § 1(b) (emphasis added); *see Lopez v. Davis*, 531 U.S. 230, 241 (2001) (concluding that "Congress' use of the permissive 'may' " in a statute conferred discretion on the agency at *Chevron* step one). Specifically, Congress provided the Service with a clear grant of rulemaking authority, requiring the Service to proceed by *regulation* should it decide to develop and implement a plan. Pub. L. No. 99-625, § 1(b) (if established, the plan was to be developed "by regulation and administered by the Service"). Congress also provided a set of certain minimum requirements that must be included in the regulations, such as how implementation of the program would relate to the status of ESA-listed species. *Id*. It did not specify the temporal duration of the program, but by making clear that the program was an *experimental* effort aimed at recovering sea otters, Congress necessarily contemplated that at some point the experiment might come to an end. Accordingly, when the Service promulgated the program, it included, from the outset, failure criteria to be used to evaluate whether the program met its goals. Notably, the inclusion of failure criteria in the regulations was not challenged when the regulations were promulgated. To be expected, the Service ultimately applied the criteria; it declared the program a failure, found that the program in fact harmed sea otters, and thus terminated the program.

As the court of appeals explained, the Service's decision to terminate the program follows directly from its Congressional authority to develop and implement the program, in addition to its overarching ESA obligations, and is thus precisely the type of action that is appropriate for deference under *Chevron*. It is well established that agencies may fill in the gaps of regulatory programs they are authorized to administer. *See, e.g.*, *Chevron*, 467 U.S. at 843 ("[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.") (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); *see also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) ("[a] very good indicator of delegation meriting *Chevron* treatment in [sic] express congressional authorizations to engage in the process of rulemaking. . . ."); *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (explaining that a statute's ambiguity generally may be interpreted as an implicit delegation from Congress to the agency to fill statutory gaps); *INS v. Aguirre–Aguirre*, 526 U.S. 415, 424 (1999) (holding that the *Chevron* framework applied to an agency's interpretation of a statute it administered).[2] As Petitioners even note, where Congress delegates implementation of a program to an agency, Congress would expect the agency "to interpret it rather than declaring it ambiguous and

[2] Deference is especially appropriate when the agency, as here, works "within its area of special expertise" and makes a "scientific determination." *Balt. Gas & Elec. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983).

throwing up its hands." Pet. at 22. That is exactly what the Service did—it fleshed out the specific requirements of the translocation program to develop criteria to evaluate its success and provide a means to end the experimental program should it fail to achieve its purpose. Therefore, this case is far from one in which agency action has no mooring to the text of the statute. The Service simply filled out the details of the translocation program and implemented it consistent with the language of Public Law 99-625.

C. This Case Concerns a Narrow Fact-Bound Dispute Unworthy of this Court's Review.

As explained above, the court of appeals properly applied settled principles of *Chevron* deference. It did so in a unique statutory and factual context that is relevant only to the specific parties in this case. The statute at issue, Public Law 99-625, was created specifically to allow the Service to establish a San Nicolas Island experimental population of southern sea otters in its effort to recover the species. Based on the expectation that such a population would be successful, the law provided an accommodation for the local fishing industry. This case concerns only one species in one specific location—in fact, it only concerns a failed attempt to establish one experimental population of that species. Even though the experimental program was discretionary and failed to protect sea otters, Petitioners would like to compel the Service to implement the program in perpetuity in order to have an exemption in place that would allow them to harm the species

by taking individuals that are not part of the experimental population. Even if accepted, their argument would not inform the application of the ESA in other contexts, and it does not warrant this Court's review.

II. The Court of Appeals' Decision Fits Squarely Within this Court's Precedents and Does Not Conflict with Decisions of Other Circuits.

Petitioners' attempts to create discord with this Court's precedents and those of other circuits all hinge on its mischaracterization of the decision below being based on statutory silence. *See* Pet. at 24. However, as explained above, the court did not base its decision on the absence of relevant language, and the Service's action is based on the clear grant of rulemaking authority in Public Law 99-625. Therefore, because this case does not concern statutory silence and instead involves settled legal principles, the opinion is consistent with relevant decisions of this Court and does not create a conflict with opinions from other circuits.

A. The Decision Below Is Consistent with this Court's Precedents.

This case fits well within the confines of this Court's precedents. The court of appeals' opinion is consistent with both *Chevron* and *Brand X* because Congress specifically provided the Service with rulemaking authority to implement the program. *See Chevron*, 467 U.S. at 845 (concluding that the agency's interpretation concerning the program it was

authorized to oversee was entitled to deference so long as it was reasonable); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (concluding the *Chevron* framework applied where the statute authorized the agency to "execute and enforce" a statute and promulgate regulations to "carry out the provisions" of that statute). Therefore, Congress "left a gap for the agency to fill" and authorized the Service to "elucidate a specific provision of the statute by regulation"—section 1(b) concerning implementation of the program. *Chevron*, 467 U.S. at 843-44. The Service's decision to terminate the failed program in accordance with criteria set forth in the program itself is a way of implementing the program.

The cases Petitioners cite in an attempt to show inconsistency with relevant decisions of this Court addressed situations, unlike here, where the agency's action was contrary to statutory language or went beyond its delegated authority. In *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, for example, this Court declined to defer to an agency where its reading of the statute resulted in a "whole new regime of regulation" that was inappropriate because it was "not the one that Congress established." 512 U.S. 218, 234 (1994) (holding that the agency's power to "modify" the requirements of a statute did not mean the agency could make a statutory requirement optional). The agency's interpretation thus went "beyond the meaning that the statute can bear." *Id*. at 229. In *Gonzales v. Oregon* this Court found deference inappropriate after concluding that the Attorney General was not

authorized to interpret a specific provision due to the "design of the statute" in that case. 546 U.S. 243, 265 (2006) (reasoning that the statute allocated judgments of the type at issue to a different agency, and the Attorney General's authority under a different provision of the statute could not support the authority it sought). Here, however, the Service's interpretation is based on the clear language of Public Law 99-625. The Service had the express authority "over the provisions of the statute" it interpreted—implementation of the translocation program. *Id*. The Service's authority to terminate the experimental program was rooted in the congressional directives in Public Law 99-625, rendering this case squarely within the confines of this Court's precedents.

B. The Decision Below Is Consistent with the Decisions of Other Circuits.

This case does not present a circuit split, as Petitioners claim. *See* Pet. at 26. The cases Petitioners cite in their attempt to conjure up a circuit split address situations where the agency interpretation was based on a statute's failure to negate its authority or was contrary to the statutory language. For example, the Tenth Circuit and D.C. Circuit both rejected agency arguments that they had certain administrative authority because the statute did not expressly withhold that authority from the agencies. *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1164 (10th Cir. 2017) (rejecting the agency's reliance on "the *absence* of any statutory directive to the contrary" as a source of rulemaking

authority (emphasis in original)); *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994), *amended,* 38 F.3d 1224 (D.C. Cir. 1994) (rejecting the argument that *Chevron* step two "is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power" and concluding that the agency lacked the power to act under "wholly different" circumstances from those authorized by the statute). In this case, Public Law 99-625 granted the Service the clear discretionary authority with respect to establishment and implementation of a program to recover the California sea otter population. Pub. L. No. 99-625, § 1(b). The law also provided detailed specifications for the plan, should the Service decide to develop one. *Id*. Thus, the agency action in this case stems from affirmative authorization to act, not the failure to negate the agency's authority, as in the cases Petitioners cite.

Petitioners also cite Fourth and Eleventh Circuit cases that addressed situations in which an agency's authority to act concerning one area within a statutory scheme did not justify its actions under a separate area. *Chamber of Commerce of U.S. v. N.L.R.B.*, 721 F.3d 152, 160-61 (4th Cir. 2013) (concluding that the statute did not contain Congressional authorization for the agency to promulgate a rule concerning an area it was not charged with overseeing); *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084 (11th Cir. 2013) (reasoning that the agency's authority was not supported by the statute where there was a clear delegation of rulemaking authority in one section

regarding a certain issue, and the absence of such authority in another section regarding another issue). In this case, however, the Service acted in accordance with the specific authority and direction provided by a clear provision of Public Law No. 99-625, section 1(b), when it established and then implemented the California sea otter translocation program.

In sum, none of the decisions Petitioners cite is inconsistent with the decision below or even relevant to this case. The cases cited by Petitioners focus on the absence of congressional delegation of authority to the agency with respect to the subject of the challenged action. Here, as explained above, Public Law 99-625 affirmatively provides the Service with its authority to implement the translocation program, by *regulation*, which appropriately includes terminating the experimental program when it failed. That delegation was express. In light of the court of appeals' conclusion that Public Law 99-625 was ambiguous with respect to the duration of the experimental program, the court proceeded to *Chevron* step two. Nothing about the way the court proceeded raises any issues regarding consistency with this Court's precedents or decisions of other circuits.

III. The Service's Decision Is Consistent with Its Authority Under Public Law 99-625 and the ESA.

Even if Petitioners' claims about the abstract issue of the application of *Chevron* to statutory silence

otherwise warranted review, this case would be a poor vehicle for considering them. The question whether the Service had legal authority to terminate the failed experimental program need not have hinged on a finding of ambiguity and consequent application of the *Chevron* step two analysis. Far from turning on any issues about the nature of statutory ambiguity under *Chevron*, the case could have been resolved in the Service's favor at step one because the Service's decision is supported by the overall statutory scheme it was implementing, including the express requirements of the ESA. That argument represents an alternative ground for affirming the judgment of the court of appeals.

As this Court held in *Chevron*, "[i]f 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." 467 U.S. at 842-43. In this case, the intent of Congress was clear: the purpose of Public Law No. 99-625 was to resolve a discrete difference between the take provisions of the ESA and MMPA so that the Service could carry out its duty under the ESA to facilitate the recovery of the California sea otter. The fact that the statute allowed an "experimental" program for the "recovery of the species" and required consultation under section 7 of the ESA provides clear evidence of Congressional intent to allow the Service to continue to implement the program only if it helped recover the species and did not put it in jeopardy. Pub. L. No. 99-625, § 1(b).

Moreover, under this Court's precedent, the Service was obligated to read each provision of Public Law

99-625 within the overall statutory scheme of which it is a part. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (statute must be read in a way that harmonizes with the overall regulatory scheme); *King*, 135 S. Ct. at 2489 (statutory language must be read in the context of the statute's overall operation and purpose). As a statute enacted to implement measures in the otter's ESA Recovery Plan and reconcile ESA and MMPA provisions, Public Law 99-625 must be read in the context of the overall regulatory scheme of the ESA. Congress did not need to say explicitly in Public Law 99-625 that the Service had the authority to terminate the experimental translocation program because that authority was already clear. While Public Law 99-625 authorized the Service to develop and implement the program initially, the Service's decision whether to continue implementing the program remained subject to its overarching duties under the ESA.

Under ESA section 7, all federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize any listed species' continued existence or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.02 (defining "jeopardize" as action that would reduce "the *survival* and *recovery* of a listed species" by "reducing the reproduction, numbers, or distribution of that species" (emphasis added)). Public Law 99-625 recognizes this obligation. Pub. L. No. 99-625, § 1(d), (e). The ESA also specifies that the Service's determinations of whether an action is likely to jeopardize a species' continued existence must be based on

"the best scientific and commercial information available" at the time the determination is made. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). The Service must reinitiate consultation on the effects of an action it has authorized or carries out when, among other things, "new information reveals effects of the action that may affect listed species . . . in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(b). The Service also has an ongoing obligation to ensure that its actions promote the California sea otters' recovery. 16 U.S.C. §§ 1532(15), 1536(a)(1); Endangered and Threatened Wildlife and Plants; Proposed Establishment of an Experimental Population of Southern Sea Otters, 51 Fed. Reg. 29,362 (Aug. 15, 1986) (explaining that the Service is responsible for conservation and management of the California sea otter).

The foregoing obligations applied to the Service's decision whether to continue implementing the translocation program. The court of appeals correctly recognized that "[t]erminating the failed translocation program is in keeping" with the Service's authority under ESA section 7. Pet. App. at A-18.

Petitioners attempt to avoid the clear requirements of the ESA and intent of Public Law 99-625 by suggesting that Congress exempted Public Law 99-625 from the ESA. Pet. at 37. This assertion, however, is patently false. As the decision below discussed, Public Law 99-625 is replete with references to the ESA and how ESA requirements are to be applied in the context of the translocation program. Pet. App. at 18. For example, the statute specifically requires that the

management zone may not interfere with expansion necessary for the California sea otter's recovery and requires consultation under section 7 of the ESA, which is a mechanism for ensuring the action will not jeopardize the survival and recovery of the threatened otters. Pub. L. No. 99-625, § 1(b)(4), (d), (e). Far from exempting the statute from ESA requirements, the provision Petitioners cite, section 1(c)(2), simply specifies how ESA requirements will apply to members of the experimental otter population. *See* Pet. at 37.

Similarly, Public Law 99-625 section 1(f) provides limited exemptions from take liability with respect to individual otters under the ESA and MMPA. It provides that "[f]or purposes of implementing the plan," no agency action "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 [ESA] or the Marine Mammal Protection Act of 1972." Pub. L. No. 99-625, § 1(f). This provision merely granted take authorization with respect to agency actions taken to "relocat[e] or manage[]" individual sea otters while the program was being implemented. *Id*. This carefully circumscribed take authorization does not exempt the Service's decision to implement or continue implementing the program from the ongoing duty to ensure that its actions do not impair the otter's likelihood of survival and recovery. *See* 16 U.S.C. § 1536(a)(2). To the contrary, section 1(b) requires the Service to specify how implementation of the experimental program relates to determinations the Service makes under ESA section 7. Pub. L. No. 99-625, § 1(b)(6).

In keeping with those duties, the Service reinitiated consultation on the effects of the translocation program after learning that it was having unexpected, deleterious effects on the California sea otter. The Service determined in its 2000 biological opinion that "expansion of the southern sea otter's distribution is essential to the survival and recovery of the species" and that artificially restricting their range to the area north of Point Conception by continuing to implement the translocation program would thwart that necessary expansion. 77 Fed. Reg. at 75,270. In other words, the program that was meant to promote otter recovery was in fact preventing it. By terminating the program, the Service properly carried out its duties under the ESA to affirmatively promote the otter's recovery and ensure that no action it authorizes or carries out, including continued implementation of the incidental take exemption in the management zone, is likely to impair the otter's chances of survival or recovery. 16 U.S.C. § 1536(a)(2).

The court of appeals correctly found that Petitioners' interpretation of the statute would result in harm to a species protected under the ESA and would thus "make no sense whatsoever." Pet. App. at A-18. The court held that Petitioners' "reading would have the effect of turning a statute with an express purpose of protecting otters into one that harmed otter populations. . . ." *Id*. This illogical outcome would violate not only Public Law 99-625, but the ESA itself. That the court did not go on to draw the logical conclusion from these statements—that the statutory scheme unambiguously authorized the agency's action—resulted in

an unnecessary resort to step two, but did not affect the correctness of the result it reached. Because that result is commanded by the unambiguous statutory scheme, the outcome of this case would not be affected by this Court's consideration of the Petitioners' proffered questions concerning the difference between statutory ambiguity and the absence of any statutory authority for an agency's action.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

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