No. 17-1636

In The
Supreme Court of the United States

CALIFORNIA SEA URCHIN COMMISSION, et al.,
Petitioners,

v.

SUSAN COMBS, et al.,
Respondents.

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v.

SUSAN COMBS, et al.,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Introduction

This case presents a question that merits review: whether a statute that "does not speak" to an issue "at all" triggers deference to an agency's otherwise unauthorized assertion of power. Here, the Ninth Circuit held that it does in a decision that expands *Chevron* deference beyond this Court's cases and conflicts with those of several other circuits. Pet. 26-30; *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). This split concerns a question of national importance as exemplified by the 17 states and other amici urging review.[1]

This case concerns a short and straightforward statute. In the 1980s, the U.S. Fish and Wildlife Service wished to establish an otter population in Southern California but the Marine Mammal Protection Act forbade it. Pet. 8. After negotiating a compromise between the agency and relevant stakeholders, Congress passed a two-and-a-half-page bill authorizing the Service to relocate otters but requiring that it also implement unique protections for the surrounding fishery. *Id.* at 8-9. Congress delegated a few discrete details to the agency, like the number of otters relocated and the means used. But most of the statute concerns what the Service must do. Pub. L. No. 99-625, § 1(b), 100 Stat. 3500 (1986) (the Service "must" issue a regulation that "shall" contain

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[1] *See* Br. of the States of Texas, Alabama, Arizona, Arkansas, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Utah, West Virginia, Wisconsin, and Wyoming, and Paul R. LePage, Governor of Maine; Br. for the Cato Institute, Goldwater Institute, and Cause of Action Institute; Br. of the Buckeye Institute for Public Policy Solutions; Br. of Landmark Legal Foundation.

the fishery protections), § 1(c) (incidental take "may not" be treated as a violation of the Endangered Species Act), § 1(d) (the Service "shall implement" the plan). Importantly, this statute contains no general delegation authorizing the Service to take any action deemed appropriate.

Despite initial obstacles, the otter population established under the law has endured for 30 years, is growing at an impressive rate, and has pushed the species over its recovery goal. Pet. 12-15. Nevertheless, the Service has announced that it will no longer honor the mandatory obligations that Congress imposed on its creation. *Id.* The Ninth Circuit upheld the Service's self-serving interpretation despite concluding that no text in the statute authorizes the agency to dispense with these requirements. App. A-17. Instead, the Ninth Circuit relied exclusively on silence—that Congress did not explicitly prohibit this precise action—under *Chevron*'s step one.

Chevron deference has grown increasingly controversial among the members of this Court, scholars, and the public. *See* Pet. 30-35; Br. of States of Texas, et al., at 3-19. This case reinforces these concerns. The "reflexive deference" the Ninth Circuit applied here elevates agency policy preferences over the Constitution's separation of powers. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *see also* Br. of the States of Texas, et al., at 5-6. A decision with such serious consequences for federal administrative law should not stand without this Court's careful consideration.

Argument

Federal Respondents and Intervenors ask the Court to overlook the Ninth Circuit's holding in favor of alternative arguments that were rejected or not addressed below. These arguments only highlight that the decision below is wrong. And they do nothing to prevent the Ninth Circuit's holding from doing great mischief. That holding expands *Chevron* deference beyond this Court's cases, conflicts with the decisions of several other circuits, and worsens *Chevron*'s already significant separation-of-powers concerns. *See* Pet. 18-34.

I.

The Ninth Circuit's Reliance on Statutory Silence Merits Review

According to *Chevron*'s two-step framework, courts begin with a statute's text. *Chevron*, 467 U.S. at 842-43. Only if that text is ambiguous do they consider whether the agency's interpretation reasonably resolves that ambiguity. *See Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015). Even in the best of circumstances, this framework raises significant constitutional concerns. Thus, no expansion of it should occur without this Court's scrutiny. *See* Pet. 30-34. The Ninth Circuit's reliance on statutory silence at *Chevron* step one is such an expansion.

The Ninth Circuit rejected Federal Respondents' argument that the statute's text authorizes the Service's action. App. A-17. For good reason: Federal Respondents misconstrue the statute's authorization to proceed with otter relocation notwithstanding the

Marine Mammal Protection Act's prior prohibition. *See* Pet. 8. The use of the word "may" in this one sentence does not convert all of the "shalls" and "musts" that follow into permissive suggestions, as Federal Respondents again urge in opposing review. Pub. L. No. 99-625, §§ 1(b), 1(c), 1(d).

Instead, the Ninth Circuit's *Chevron* step-one analysis turns entirely on statutory silence. App. A-17. According to the Ninth Circuit, if Congress neither gives an agency power nor explicitly withholds it, courts should proceed to step two and defer so long as the agency's decision reflects a defensible policy.

A. The Ninth Circuit expanded *Chevron* beyond this Court's cases

The Ninth Circuit expanded *Chevron* beyond this Court's cases. *See* Pet. 21-26. Federal Respondents cite several cases in which this court in passing referred to silence in addressing deference. But these cases only prove that "when th[is] Court has spoken of [] silences or gaps, it has been considering undefined terms in a statute or statutory directive to perform a specific task without giving detailed instructions." *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1163 (10th Cir. 2017); *see* Pet. 21-26.

In *Entergy Corp. v. Riverkeeper*, the Clean Water Act directed EPA to set standards based on the "best technology available." 556 U.S. 208, 212-15 (2009). Because this phrase is undefined, the Court deferred to the agency's determination that it could consider costs of different technologies. *Id*. at 218-23.

In *Environmental Protection Agency v. EME Homer City Generation, L.P.*, the Clean Air Act charged EPA with regulating interstate emissions, without resolving how to allocate reductions where multiple states contribute to a downwind problem. 572 U.S. 489, 134 S. Ct. 1584, 1594-95 (2014). Thus, the Court deferred on whether the agency could consider relative costs among states. *Id*. at 1603-04.

Federal Respondents also cite *Home Concrete & Supply, LLC*, and *Utility Air Regulatory Group*, in which this Court denied deference despite the statute's lack of an *explicit* prohibition against the challenged action. *United States v. Home Concrete & Supply*, 566 U.S. 478, 489-90 (2012); *Util. Air Reg. Gp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

Departing from these cases, the Ninth Circuit did not rely on any undefined term or ambiguous statutory directive; it relied "instead on the *absence* of any statutory directive to the contrary." *Marlow*, 861 F.3d at 1164; *see* Pet. 22-24. This is a significant expansion of *Chevron*. If it is a correct interpretation, *Chevron* should be reconsidered. *See* Pet. 25-26; Br. of the States of Texas, et al., 3-19.

B. This question has divided the courts of appeals

The Ninth Circuit conflicts with every other circuit to consider the question. Pet. 26-30; Br. of the States of Texas, et al., 19-20. A conflict on such an important and controversial issue merits attention.

Federal Respondents deny the existence of this conflict, although their reasoning is less than pellucid.

They appear to argue that, because *Chevron* considers statutory context, there can be no broadly applicable rule concerning the role of statutory silence. Thus, courts can only be in conflict on narrow, statute-specific questions.

This argument can easily be rejected. This Court has long recognized broadly applicable rules in deference cases. *Chevron* itself is such a rule. So is the "major questions" doctrine. *See Util. Air Reg. Gp.*, 134 S. Ct. at 2444 (absent clear guidance from Congress, courts should not defer to agencies on questions of vast economic and political significance). If a court of appeals issued a holding contrary to either rule, it would present a clear conflict.

The same analysis applies here. The Ninth Circuit held that statutory silence satisfies *Chevron* step one. Every other circuit to consider the question has adopted the opposite rule. *See, e.g.*, *Marlow*, 861 F.3d at 1164 ("[S]ilence . . . is no 'gap' for an agency to fill."); *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (denying "that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power").

Federal Defendants cite several D.C. Circuit cases to suggest the conflict is illusory. But these citations only prove that the D.C. Circuit, like this Court, defers only on "undefined terms in a statute or a statutory directive to perform a specific task without giving detailed instructions." *Marlow*, 861 F.3d at 1163; *see, e.g., Americans for Clean Energy v. EPA*, 864 F.3d 691, 733 (D.C. Cir. 2017) (deferring to an agency's interpretation of a provision authorizing it to waive

renewable fuel requirements); *Anna Jacques Hospital v. Burwell*, 797 F.3d 1155, 1164 (D.C. Cir. 2015) (deferring to an agency's interpretation of an authorization to adjust geographic boundaries for hospital regulation).

Finally, Federal Respondents seek to distinguish this case from those where an agency claims atextual regulatory power. This attempt to narrow the Ninth Circuit's statutory silence theory is both inconsistent with the Ninth Circuit's approach and fails to distinguish this case. Here, for instance, the Service claims authority to regulate incidental take of otters straying from San Nicolas Island without text authorizing it to do so. *See* Pub. L. No. 99-625, § 1(c) (the Service "may not" regulate this activity).

II.

The Ninth Circuit's Step-Two Analysis Further Supports Review

Federal Respondents assert that review is unnecessary because the Service's decision is reasonable. For this argument, they conflate *Chevron*'s two steps and further muddy the doctrine.

In fact, their argument only proves that the statutory silence theory eliminates step two as "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).

Instead, the theory "license[s] 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. This raises nondelegation doctrine concerns by requiring deference where Congress did not expressly delegate a power much less identify the intelligible principle governing its exercise. Pet. 36. Finally, it "create[s] the impression that agency policy concerns, rather than the traditional tools of statutory constructions, 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).

For instance, Federal Respondents imagine a hypothetical wherein the Service had never reintroduced sea otters into Southern California. Not only does the hypothetical bear no relation to reality but also it is too farfetched to affect the statute's interpretation. Pet. 12-13. The Service developed the idea to relocate otters, asked Congress to approve it, and participated in Congress' negotiation of the compromise bill. Pet. 8-9; 132 Cong. Rec. S17321-22 (Oct. 18, 1986). In these circumstances, the use of the discretionary term "may" in the sentence setting aside the Marine Mammal Protection Act's prior prohibition against moving otters does not justify ignoring that every operative provision thereafter says "shall," "must," or "may not." Pub. L. No. 99-625, § 1(b), § 1(c), § 1(d).

Hoping to anchor the Ninth Circuit decision in some text, Federal Respondents also note the phrase "experimental population" to describe the San Nicolas Island population. However, the definition contains no

text undermining the mandatory nature of the fishery protections. *See* Pub. L. No. 99-625, § 1(a)(3). Nor has the Service ended the "experimental population"; the healthy San Nicolas Island population remains. Instead, the Service has twisted this unrelated use of "experimental" to justify ending the protections that Congress required to establish this population.

Federal Respondents also cite the statute's references to the Endangered Species Act, ignoring that one of those references makes that statute inapplicable to implementation of Public Law No. 99-625's fishery protections. Pub. L. No. 99-625, § 1(f). Even absent that exemption, the statute's mandatory language would preclude the Endangered Species Act's application. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666-67 (2007). Besides, there is no such conflict since the San Nicolas Island population is healthy and the statute limits removal of otters to the use of "feasible, nonlethal means."

Federal Respondents also observe that otters from the mainland wandered into the protected fishery a decade after the new population was established without identifying any relevance the statute assigns to this fact. Notably, the Service has not proposed trimming the management zone but has eliminated protections for the entire fishery. In fact, Public Law 99-625 anticipates this development and gives it the opposite effect as the Service claims. The statute declares that all sea otters found in the protected fishery would be treated alike regardless of where they wandered from. Pub. L. No. 99-625, § 1(b).

Finally, Federal Respondents appeal to a self-serving view of the statute's purpose, claiming that Congress would want the fishery protections discontinued if it would benefit the otter. The legislation, however, balances multiple goals: otter recovery and fishery protection. *See* Pub. L. No. 99-625, § 1(b). That balance has been achieved by a healthy and growing otter population coexisting with a healthy fishery. Pet. 12-13. The Service's decision upends that balance.

In each of these step-two arguments, the statutory silence theory is used to elevate the agency's policy preferences over the text of the statute enacted by Congress, thereby upsetting the Constitution's separation of powers.

III.

The Fishermen Have Standing

Attempting to cloud the issues, Federal Respondents also imagine a variety of vehicle problems related to the Fishermen's standing. These arguments were correctly rejected by the district court and the Ninth Circuit. They need not trouble this Court.

The Fishermen easily satisfy standing. The Service's decision injures them by eliminating any check on otter expansion into the fishery, which will deplete shellfish populations they depend on for their livelihoods. App. A-15; *see* Goldenberg Decl., *Cal. Sea Urchin Comm'n v. Bean*, 13-cv-05517, Doc. No. 93-4 (filed Nov. 11, 2016); Harrington Decl., *Cal. Sea Urchin Comm'n v. Bean*, 13-cv-05517, Doc. No. 93-5

(filed Nov. 11, 2016); AR4365; AR5228; AR5245.[2] The Service's action also undermines the Fishermen's work to recover Southern California's abalone fishery because otters preclude abalone populations reaching levels needed for sustainable fishing. Harrington Decl. ¶¶ 8-11.

The Service's action forces the Fishermen to choose between leaving an area upon encountering otters or risk significant civil and criminal penalties for any inadvertent harm or disturbance. *Id.* ¶ 24; Goldenberg Decl. ¶ 9. Incidental take is, by its nature, unintended. Therefore, no reasonable precautions exist other than to abandon productive fishing grounds in search of other areas.

As the San Nicolas Island population continues its healthy growth, these injuries will increase. The relief the Fishermen seek will "remove" a "substantial legal roadblock" to the protection of their interests, thus redressability is satisfied. App. A-14-15.[3]

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[2] The Fishermen do not rely on mere allegations but unrebutted evidence corroborated by the administrative record.

[3] The Fishermen have not conceded a standing problem as Federal Respondents suggest. When Intervenors asserted that the Fishermen would require the lethal removal of otters from the fishery, the Fishermen responded that "[o]n its face, the statute only requires the Service to catch and remove otters if there are feasible, non-lethal means of doing so." Pl.'s Combined Reply and Opposition to Cross-Motions for Summ. J., *Cal Sea Urchin Comm'n v. Bean*, 14-cv-08499, Doc. No. 44 (filed Aug. 5, 2015). This faithfulness to the statute's text does not deny the Fishermen standing to enforce that text.

Similarly misleading is Federal Respondents' reference to a consent decree joined by some of the Fishermen. That decree

Federal Respondents attack standing because complete relief depends on the Service's future judgment whether "feasible, nonlethal means" exist to relocate wandering otters. The Ninth Circuit correctly rejected this argument. App. A-14-15. The D.C. Circuit has denounced the argument as "a breathtaking attack on the legitimacy of virtually all judicial review of agency action" because such cases routinely involve remands to agencies. *Akins v. FEC*, 101 F.3d 731, 738 (D.C. Cir. 1997). This Court too has rejected "the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum" which "would doom most challenges to regulatory action." *See Massachusetts v. EPA*, 549 U.S. 497, 524 (2007).

Although further inquiry is unnecessary, the Fishermen also have standing as the "objects" of the challenged action. Pet. 16 n.8; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The Service's decision is "directed at them in particular; it requires them to make significant changes in their everyday business practices; [and] if they fail to observe [the regulation] they are quite clearly exposed to the imposition of strong sanctions." *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967); *see* Goldenberg Decl. ¶ 9; Harrington Decl. ¶ 24. The Ninth Circuit asserted an additional requirement for those challenging agency action: proof of a history of enforcement or an individualized threat of enforcement (despite the likelihood that, as here, the

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expressly preserved this challenge. *See* Stipulated Settlement Agreement, *The Otter Project v. Salazar*, 09-cv-4610, Doc. No. 66, ¶¶ 8, 10 (N.D. Cal. Nov. 22, 2010).

rule may have only just issued). That requirement finds no support in this Court's cases. *See Abbott Labs.*, 387 U.S. at 151-52; *see also Sackett v. EPA*, 566 U.S. 120, 125-26 (2012). This troubling dicta compounds the need for this Court's review.

Conclusion

The petition for certiorari should be granted and the Ninth Circuit's decision reversed.

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