No. 15-56672

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA SEA URCHIN COMMISSION, et al.,
Plaintiffs-Appellants,

v.

MICHAEL BEAN, in his official capacity as Acting Assistant Secretary for Fish and Wildlife & Parks, Department of Interior, et al.,
Defendants-Appellees

and

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Intervenors-Defendants-Appellees.

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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellants state that they are not publicly held corporations, do not issue stocks, and do not have parent corporations.

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STATEMENT OF SUBJECT MATTER JURISDICTION

This appeal arises from the district court's judgment granting Defendants' and Defendant-Intervenors' Motions for Summary Judgment. Excerpts of Record (ER) Vol. 1 at 1-3. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702 (judicial review of federal agency action). The district court's entry of judgment on September 23, 2015, is a final judgment under Rule 54(a) of the Federal Rules of Civil Procedure. Appellants filed a Notice of Appeal on October 27, 2015. 2 ER at 17. The statutory basis for this Court's appellate jurisdiction is 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Do fishermen have standing to challenge a final agency action that threatens their fishery with predation and imposes burdensome regulations on them, which are enforceable through civil and criminal penalties, as well as citizen suits for injunctive relief?
2. The Administrative Procedure Act (APA) authorizes anyone to petition for the issuance, amendment, or repeal of any rule. Is a petition invalid if it uses the term "rescission"—a synonym of repeal—rather than "repeal" or "amendment"?
3. When Congress codified a compromise in Public Law No. 99-625—authorizing the Service to establish a new sea otter population on the condition

that it "shall implement" protections for the surrounding fishery and fishermen—did it give the Service power to accept this new authority, enjoy its benefits of the compromise, but later disclaim compliance with the protections?

STATUTORY PROVISIONS

1. The APA provides at 5 U.S.C. § 553(e):

> Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

2. Section 1(b) of Public Law No. 99-625 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 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.

3. Section 1(c)(2) of Public Law No. 99-625 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.

4. Section 1(d) of Public Law No. 99-625 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.

5. Section 1(f) of Public Law No. 99-625 states:

> 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.

STATEMENT OF THE CASE

A. Introduction

In enacting Public Law No. 99-625, 100 Stat. 3500 (1986), Congress cemented a compromise between the U.S. Fish and Wildlife Service, environmentalists, and fishermen. The compromise provided the Service authority to establish a new population of sea otters in Southern California—a controversial idea because of its potential impacts on the surrounding fishery and the fishermen who work it—on the condition that it implement protections for both.

These protections include a requirement that the Service use any feasible, nonlethal means to remove otters that wander into the surrounding fishery (to prevent predation). They also include an exemption from the Endangered Species and Marine Mammal Protection Acts for anyone who accidentally harms a sea otter in the surrounding fishery. The latter protection is what allows fishermen to continue to pursue their livelihood, free of the threat of lawsuits, civil fines, and criminal penalties, should they accidentally catch or disturb a sea otter during the performance

of their work. The statute unambiguously conditioned the newly given authority on the acceptance of these protections and commanded that the Service "shall implement" them.

Now, thirty years after establishing the new otter population—which remains on San Nicolas Island today—the Service has unilaterally terminated the protections mandated by the statute. That violates Public Law No. 99-625's mandates and Plaintiffs' (the Fishermen) petition demanding the restoration of the compromise should have been granted.

B. Background

1. The Southern Sea Otter

The southern sea otter—also known as the California sea otter—has been listed as a threatened species under the Endangered Species Act since 1977. 3 ER at 226-63. At the time of listing, the main threat to the species was the risk of a major oil spill within its range. 3 ER at 227; *see* 42 Fed. Reg. 2968 (Jan. 14, 1977). As a threatened species and a marine mammal, the sea otter is protected by the "take" prohibitions of the Endangered Species and Marine Mammal Protection Acts, which forbid essentially any act that adversely affects a single member of the species or its habitat and can be enforced through citizen suits, civil fines, and substantial criminal penalties. *See, e.g.*, 16 U.S.C. §§ 1538, 1540.

2. Public Law No. 99-625

In the early 1980s, the Service determined that a new population of sea otters should be established, outside the species' existing range, to reduce the risk that the entire population could be affected by a single oil spill. 3 ER at 377-80. This proposal proved controversial because of the impacts of the take prohibition on nearby commercial and recreational activities and the impacts the new population would have on surrounding fisheries. *See* 3 ER at 339. The sea otter is a voracious predator of shellfish and other seafood and could therefore reduce the fishery below sustainable levels. 3 ER at 356. The proposal was also barred by the Marine Mammal Protection Act. 3 ER at 339. Consequently, the only way for the Service to proceed was to ask Congress to okay the plan.

After several efforts to enact legislation authorizing the plan failed, Congress considered Public Law No. 99-625. According to the bill's legislative history, those earlier efforts failed because of conflicts between the Service, environmental groups, and fishermen and others who would likely be impacted by the establishment of the new population. 3 ER at 339. Public Law No. 99-625 codified a compromise reached among those disparate interests, allowing the conflicts to be overcome. *See id*.

The resulting statute is short and straightforward. It authorizes the Service to establish a new sea otter population, subject to certain conditions. Pub. L. No. 99-625. These conditions include the identification of a "management zone" around the new

population. *See id*. § 1(b). The Service is obliged to use any feasible, nonlethal means to remove sea otters that wander into this zone and exempt incidental take[1] of sea otters within it. *See id*. § 1(b), (c). The statute gave the Service the choice to accept this conditional grant of authority, providing that it "may" proceed with the plan but, if it did, the statute says that the Service "shall" include the management zone's protections in its regulation and "shall implement" them. *See id.* § 1(b), (d).

3. The Service's 1987 Regulation Establishing a New Sea Otter Population

Shortly after the statute was enacted, the Service proceeded with its plan to establish the new sea otter population. It adopted a regulation providing for the translocation of otters to Southern California's San Nicolas Island and a management zone around the island from Point Conception to the Mexican Border. 3 ER at 238-43. The regulation also asserted the authority to terminate the plan if it failed to achieve any of five benchmarks. 3 ER at 245. According to the regulation, if any of these benchmarks were not met and the cause could not be determined, the Service could, in its discretion, terminate the program (and the protections mandated by Public Law No. 99-625) and any otters on San Nicolas Island would be returned to the parent population. *Id*.

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[1] The incidental take exemption is not limited to fishing, but includes oil extraction, recreation, and any other lawful activities in the management zone. *See* Pub. L. No. 99-625, § 1(c).

4. The Plan Is Less Successful Than Expected

From 1987 to 1991, the Service moved otters to San Nicolas Island, to establish the population. 2 ER at 61-93. Dispersal from the island was far higher than the Service anticipated, causing the population to be smaller than planned. 2 ER at 65. The Service removed any otters that wandered into the management zone until 1993. *Id*. It stopped implementing this containment requirement that year, however, because it determined that the high mortality rate associated with capturing and relocating the animals threatened to jeopardize the species. 2 ER at 65-66; *see* 2 ER at 106. The Service continued to respect the incidental take exemption from the Endangered Species and Marine Mammal Protection Acts. More recently, the parent population has expanded its range so that, today, otters seasonally migrate into the northern portion of the management zone. 2 ER at 65.

5. The Service Decides To Terminate the Plan

Twenty-five years later, the Service found that the population did not reach the regulation's benchmark for the third year of implementation (which, at that point, was more than twenty years earlier). 2 ER at 84. In 2012, when this determination was made, San Nicolas' sea otter population consisted of approximately 50 animals and was growing at an average of 7% per year. 2 ER at 67; 2 ER at 74. However, the population's current status played no role in the Service's decision. 2 ER at 74.

Because an early benchmark had not been met, the Service issued a rule repealing the regulation, which terminated the management zone and its protections for the fishery and fishermen. 2 ER at 62-93. Contrary to the regulation, that termination decision left the San Nicolas Island population in place. 2 ER at 63; *see* 3 ER at 245 ("If . . . the Service concludes . . . that the translocation has failed . . . all otters remaining within the translocation zone will be captured and placed back into the range of the parent population."). Consequently, today, a population of sea otters has been established on San Nicolas Island but none of Public Law No. 99-625's protections for the surrounding fishery and fishermen apply.

Shortly after this rule was issued, the Fishermen[2] challenged it on the grounds that it conflicts with the statute. That case was dismissed on statute of limitations grounds and is currently on appeal to this Court. *See Cal. Sea Urchin Comm'n v. Jacobson*, No. 14-55580 (9th Cir. argument scheduled for May 6, 2016).

6. The Fishermen Petition To Restore the Statute's Compromise

After their direct challenge to the termination decision was dismissed, the Fishermen submitted an APA petition, seeking the restoration of the statute's protections. 2 ER at 52-60. The petition demanded the repeal of the termination decision and the provisions in the 1987 regulation authorizing it, arguing that both

[2] The direct challenge to the termination decision was brought on behalf of the three organizations involved in this case and the California Lobster Trap Fishermen's Association.

conflicted with the statute. *Id*. On July 28, 2014, the Service denied the petition on the grounds that (1) the failure criteria—indeed, all of the regulation—had already been repealed; (2) the termination decision is not a rule and therefore not the proper subject of an APA petition; and, (3) the Service disagrees with the Fishermen's interpretation of Public Law No. 99-625. 1 ER at 16.

C. Procedural History

On November 3, 2014, the Fishermen filed their complaint challenging the denial of their petition. 2 ER at 34-51. A few months later, seven environmental groups intervened. 3 ER at 414-15. All parties subsequently moved for summary judgment. 3 ER at 417-19. The court below denied the Fishermen's motion and granted the Service's motion, ruling that the Fishermen lack standing, the petition did not comply with the APA, and rejecting the Fishermen's legal arguments on the merits. 1 ER at 4-15. The court entered judgment and this appeal promptly followed. 3 ER at 422.

STANDARD OF REVIEW

This Court "review[s] the grant of summary judgment de novo, thus reviewing directly the agency's action under the Administrative Procedure Act[.]" *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir. 2004). Under the APA, an agency decision must be set aside if it is "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

When interpreting a statute, the Court first determines "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If it has, that interpretation controls. If the statute is ambiguous, the Court may defer to the agency charged with implementing the statute, if its interpretation is reasonable. *See id.* at 844.

SUMMARY OF ARGUMENT

In 1986, Congress enacted into law a compromise struck by the Service, environmental groups, and the fishing industry. Pub. L. No. 99-625. This statute authorized the Service to establish a population of sea otters in Southern California—a proposal which had proven controversial because of its potential impacts to the surrounding fishery and those who work and play in surrounding waters. 3 ER at 339. To allay those concerns, Congress conditioned the new authority on the Service's acceptance and implementation of protections for the fishery and those who work and play in it, including using any feasible, nonlethal means to remove otters from the management zone and exempting incidental take. Pub. L. No. 99-625, § 1(b), (c), (d). It made this explicit, providing that, if the Service moves forward, it "shall implement" the protections. *See id*. § 1(d).

Now, having long since established this population of otters, the Service has soured on the compromise and has unilaterally disclaimed further implementation of the statute's protections. 2 ER at 61-93. As the Fishermen explained in their petition, the statute does not allow this and the protections must be restored. 2 ER at 52-60. Because their livelihoods depend on the health of the fishery and they are the objects of the statute's take exemption, they have standing to challenge the Service's violation of the statute. Their petition appropriately asks for the repeal of rules that conflict with the statute and should have been granted. Thus the decision below—denying them that relief—should be reversed.

ARGUMENT

I

PLAINTIFFS HAVE STANDING TO CHALLENGE THE DENIAL OF THEIR PETITION

To have standing, a party must (1) have suffered an "injury in fact," *i.e.* an invasion of a legally protected interest; (2) demonstrate a causal connection between the injury and the conduct complained of; and (3) it must be likely that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Furthermore, for standing purposes, the Court must "assume that on the merits the plaintiffs would be successful in their claims." *See Defenders of Wildlife v.*

Gutierrez, 532 F.3d 913, 924 (D.C. Cir. 2008). In that light, the Fishermen easily satisfy this standard.

The Fishermen are injured by the denial of their petition because, unless it is granted, they will be subject to the Endangered Species and Marine Mammal Protection Act's take prohibitions if any of their activities incidentally take a sea otter. This exposes them to citizen suits to stop them from pursuing their livelihoods and substantial civil and criminal penalties. *See* 2 ER at 27-29; 2 ER at 30-33; *see also* 16 U.S.C. §§ 1538, 1540. They are the objects of this regulation and therefore have standing to challenge it. *See Lujan*, 504 U.S. at 562 (standing easily established by "the object of the government action or inaction he challenges"). They are also injured because, unless their petition is granted, the Service will be free to ignore its obligation to use any feasible, nonlethal means to remove sea otters that threaten their fishery with predation. *See* 2 ER at 27-29; 2 ER at 30-33; 2 ER at 61-93.

These injuries are a consequence of the Service's decision to terminate the management zone's protections. Therefore, granting the Fisherman's petition would provide them with relief, by reinstating the incidental take exemption and the Service's obligation to use feasible, nonlethal means to remove sea otters from the management zone. *See* 2 ER at 52-60.

A. The Fishermen Have Standing as the Objects of the Regulation

The Service contends that the Fishermen do not have standing based on the incidental take exemption because they have not articulated a "concrete plan"[3] to violate the prohibition nor shown that they will imminently be prosecuted by the Service for it. *See Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 772-73 (9th Cir. 2006); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000). The Service stretches these cases too far.

Under the APA, the Fishermen have a right to challenge the denial of their petition (agency action unlawfully withheld) "without meeting all the normal standards for redressability and immediacy." *See Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007). Here, there is plainly "some possibility that the requested relief will

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[3] It's not clear what sort of "concrete plan" the Service thinks is required. The affidavits submitted by the Fishermen show that their members are actively engaged in fishing, which can incidentally take sea otters. *See* 2 ER at 28 ("The Commission represents divers who operate in the former management zone . . . ."); 2 ER at 29 ("As sea otters expand into the fishery, urchin divers will be at risk of violating the Endangered Species and Marine Mammal Protection Acts' take prohibition if they get too close to them . . . ."); 2 ER at 31 (Declaration of Michael Harrington, a fishermen and member of the California Abalone Association and Commercial Fishermen of Santa Barbara); 2 ER at 33 ("As a sea urchin fishermen, the termination decision threatens me [Michael Harrington] with criminal punishment for incidental take of sea otters. Under Public Law No. 99-625, my activities are exempt."). If the Service means that they must specifically plan to take a sea otter, that clearly can't be required. *Intentionally* taking a sea otter wouldn't be subject to the *incidental* take exemption that the Fishermen seek to restore.

prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *See id*. at 518.

The cases on which the Service relies are designed to ensure that a claim is ripe, "prevent[ing] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements," and are thus inapplicable here. *See Sacks*, 466 F.3d at 773 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)). They have never been interpreted to forbid a party from timely challenging a regulation being imposed on it under the APA, based on the mere possibility that the agency might not enforce it. As the Supreme Court has recognized, the objects of a regulation easily establish standing to challenge it. *See Lujan*, 504 U.S. at 562. This Court routinely hears such challenges brought by regulated parties.[4]

Here, the Fishermen challenge the unlawful imposition of the Endangered Species and Marine Mammal Protection Acts' take prohibitions on their activities. 2 ER at 52-60; 2 ER at 61-93. That regulation restricts their right to pursue their occupation and they have a right to challenge it under the APA. *See* 2 ER at 27-29;

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[4] *See, e.g.*, *Arizona v. EPA*, ___ F.3d ___, 2016 WL 722685 (9th Cir. Feb. 24, 2016); *Oregon Restaurant and Lodging Ass'n v. Perez*, ___ F.3d ___, 2016 WL 706678 (9th Cir. Feb. 23, 2016); *Building Industry Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027 (9th Cir. 2015); *Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014); *Alaska v. Lubchenco*, 723 F.3d 1043 (9th Cir. 2013); *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013); *Peck v. Thomas*, 697 F.3d 767 (9th Cir. 2012).

2 ER at 30-33. In fact, since the Service had previously stopped removing sea otters from the management zone, the only practical consequence of the management zone's termination was to repeal the incidental take exemption. *See* 2 ER at 61-93. Therefore, the decision itself demonstrates that the Service intends to enforce it.

The Service's argument should also be rejected because anyone—including any of the seven intervenors in this case—could bring a citizen suit to enjoin activities, like fishing, that can incidentally take sea otters. *See* 16 U.S.C. § 1540(g). Environmental groups routinely bring such suits to stop economic and recreational activity that can have adverse effects on species.[5]

The denial of the Fishermen's petition is no "abstract disagreement." *See Sacks*, 466 F.3d at 773. Clearly, as the object of the regulation they seek to repeal with their petition, the Fishermen are injured and have standing to seek redress of that injury.

B. The Fishermen Have Standing Based on Their Interest in the Fishery

In addition to being the objects of the regulation, the Fishermen have standing to challenge the denial of their petition based on their interest in protecting the

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[5] *See, e.g.*, *Aransas Project v. Shaw*, 756 F.3d 801 (5th Cir. 2014); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); *Kuehl v. Sellner*, ___ F. Supp. 3d ___, 2016 WL 590468 (N.D. Iowa Feb. 11, 2016); *Center for Biological Diversity v. Otter*, 2016 WL 233193 (D. Idaho Jan. 8, 2016); *California River Watch v. County of Sonoma*, 55 F. Supp. 3d 1204 (N.D. Cal. 2014); *Alliance for the Wild Rockies v. Kruger*, 15 F. Supp. 3d 1052 (D. Mont. 2014); *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075 (D. Or. 2012); *Animal Welfare Institute v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540 (D. Md. 2009).

management zone's fishery. That is the precise interest that Congress sought to protect when it required the Service to remove otters from the fishery. *See* 3 ER at 339; *cf. Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939-40 (9th Cir. 2005) (discussing this Court's prudential "zone of interest" test). The Service does not deny that the Fishermen have standing to challenge the denial of their petition based on these impacts to the fishery. Instead, it argues that they have so radically altered their position during the course of this litigation that they have effectively waived it. This is demonstrably false.

First, there has been no change in the Fishermen's argument. From the filing of the petition until now, they have consistently argued that the statute mandates implementation of the management zone's protections. *See, e.g.*, 2 ER at 52-60. However, faithful to the statute's text, they have recognized that the statute doesn't require the Service to go beyond the statute's requirements to protect the fishery. This, the Service contends, was a fatal admission. But it wasn't. The Fishermen's brief, which the Service asserts waived their interest in the fishery, merely acknowledged that the statute's mandate to capture sea otter in the management zone was limited to "feasible, nonlethal means." *See* Pub. L. No. 99-625, § 1(b).

This acknowledgment was in response to the Service's argument below that a literal reading of the statute would be absurd because it would require the Service to continue removing sea otters from the management zone despite the fact that its earlier

efforts led to high mortality and threatened to jeopardize the species' survival. In reply, the Fishermen noted that the statute itself avoids this result by limiting the obligation to the use of feasible, nonlethal means. 2 ER at 21-26.[6] If there aren't any such means,[7] the Service isn't under any obligation to use lethal means.

The Fishermen's faithfulness to the statute's text does not deprive them of standing. Perhaps Congress' expectation that the Service will continuously look to refine the most effective and humane method of complying with this requirement may not bear fruit. *See* 3 ER at 340 ("In order to carry out this directive, the Service is expected to conduct research to refine the most effective and humane methods for

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[6] *See* 2 ER at 22 ("Because there is no feasible, non-lethal means of capturing and removing sea otters within the management zone, the statute doesn't require the Service to do so."); 2 ER at 24 ("To be clear, the result of following the literal meaning of the statute would *only* be that individuals who work and recreate in Southern California's waters could not be fined or imprisoned for incidentally taking a sea otter. It wouldn't require the Service to resume capturing and removing otters that wander into the management zone. The Service has determined that doing so would jeopardize the species because of the high mortality rate associated with catching and relocating the otters. This does not suggest any absurdity, however. On its face, the statute only requires the Service to catch and remove otters if there are feasible, non-lethal means of doing so. Since there aren't any, it doesn't." (citations omitted)); *see* 2 ER at 25 ("Public Law No. 99-625 only requires the Service to remove otters from the management zone if there are feasible, non-lethal means of doing so.").

[7] This case must be decided on the basis of the administrative record, which indicates that capturing and relocating sea otters has historically resulted in high mortality. *See* 2 ER at 65; 2 ER at 106. The record does not indicate whether any nonlethal methods have since been developed or any reason why they can't be.

containing sea otters."). But this possibility is not an obstacle to the Fishermen's standing to challenge the Service's refusal to honor the statute's requirements entirely.

The Supreme Court has held that practical considerations, like this, are no barrier to standing. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Court held that a real estate developer had standing to challenge a racially discriminatory zoning decision, notwithstanding the fact that, even without that barrier, there was no guarantee that its development would be built. *See* 429 U.S. 252, 261-62 (1977). The Court rejected the argument that practical obstacles can bar a plaintiff from challenging a law or regulation that is an absolute barrier to the relief it seeks. *See id*. at 262. Instead, it is enough that, if the plaintiff succeeds, that legal barrier would be removed. *See id*.; *see also Larson v. Valente*, 456 U.S. 228, 243 (1982).

Here, the Service's repeal of its regulations requiring it to implement the statute's protections for the management zone are an absolute barrier to protecting the fishery. If the Fishermen or the Service develop feasible, nonlethal means, it would nonetheless prevent the Fishermen from requiring the Service to use them. That is enough to establish standing.

II

PLAINTIFFS SUBMITTED A VALID APA PETITION

The APA gives citizens rights to participate in the administrative process and sets forth minimum procedural safeguards for the exercise of agency powers. *See* S. Rep. No. 752 (1945), *reprinted in* Government Printing Office, Administrative Procedure Act Legislative History (1946). Its broad purposes guarantee not only the right for citizen engagement but impose an obligation on agencies to take citizens' concerns seriously. *See* Jonathan Weinberg, *The Right To Be Taken Seriously*, 67 U. Miami L. Rev. 149, 149-58 (2012). Public participation is so essential that courts are required to invalidate otherwise defensible government actions if the agency fails to adequately address citizen concerns. *See Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (opportunity to comment would be "meaningless" if agency actions that ignored comments were upheld).

One way that the statute encourages citizen participation in the administrative process is by creating a right to petition for the issuance, amendment, or repeal of any rule. 5 U.S.C. § 553(e); *see* 43 C.F.R. § 14.2. For these purposes, "rule" is defined very broadly and includes "the whole or a part of an agency statement of general or

particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).[8]

The Fishermen submitted a petition requesting that the Service "rescind" the rule terminating the management zone and the section of the regulation authorizing it. 2 ER at 52-60. This was a valid petition seeking two things: the repeal of the 2012 rule terminating the management zone's protections and the partial repeal of the (thus restored)[9] 1987 regulation. Both the termination decision and the regulation are within the APA's broad definition of "rule," and thus their amendment or repeal were proper subjects of a petition. *See* 5 U.S.C. § 551(4).[10]

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[8] In ruling against the Fishermen, the court below stated that "the APA does not provide for partial repeal of a rule." 1 ER at 11. To the contrary, the APA defines "rule" to include not only the whole, but also "any part" of a rule. 5 U.S.C. § 551(4). Therefore, a petition may seek the repeal of part of a rule. *See* 5 U.S.C. § 553.

[9] The regulation was repealed as a consequence of the termination decision. If the termination decision is repealed, as the Fishermen requested in their petition, the regulation would be reinstated and could be amended as requested. *See* 2 ER at 52-60.

[10] The court below also held that the petition was defective because it does not "provide the text of a proposed rule or amendment." 1 ER at 11; *see* 43 C.F.R. § 14.2. However, the petition did not seek the addition of any new language, therefore there was no proposed text to include. The language to be deleted was clearly identified and the Service made its position on the petition's merits clear. 1 ER at 16; 2 ER at 52-60.

There is *no* support for the proposition that an APA petition is invalid if it uses a synonym of "issuance," "amendment," or "repeal," rather than those exact terms.[11] Although no circuit has decided this precise question. Decisions on related questions demonstrate that the APA should be interpreted liberally, to further the statute's purpose of facilitating citizen engagement in the administrative process. *Cf. Sackett v. EPA*, 132 S. Ct. 1367, 1372-73 (2012) (presumption of judicial review under the APA).

In *American Horse Protection Association v. Lyng*, for instance, the D.C. Circuit considered a challenge to an agency's failure to respond to a petition, despite the fact that the plaintiff never submitted a formal petition. *See* 812 F.2d 1, 5 (D.C. Cir. 1987). Instead, the plaintiff made informal requests for rulemaking. *See id*. This was sufficient, the D.C. Circuit explained, because neither the agency's regulations nor the APA "specifies any formalities for a rulemaking petition." *Id*.; *cf. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 4-5 (D.C. Cir. 2011) (the sufficiency of a petition is measured by the substantive outcome the petitioner seeks). The same is true here. *See* 5 U.S.C. § 553(e); 43 C.F.R. § 14.2.

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[11] In *Aviators for Safe & Fairer Regulation, Inc. v. F.A.A.*, the First Circuit rejected an untimely APA challenge suggesting that, if the petitioners wanted to bring their challenge, they should "file a petition for rulemaking to *modify* the current regulation." 221 F.3d 222, 231 (1st Cir. 2000) (emphasis added). It's doubtful that the court would have responded kindly if the agency refused to process a subsequent petition because it asked to "modify," rather than "amend," the regulation.

It would also be a waste of party and judicial resources to require the Fishermen to submit a new petition using "amend" and "repeal," instead of "rescind," since the Service has made its views on the underlying statutory interpretation question clear. *Cf. Brown v. Sec'y of Health & Human Servs.*, 46 F.3d 102, 114-15 (1st Cir. 1995) (excusing the failure to submit a petition, where it would have been futile in light of the agency's position on the legal question that would have been raised).

III

PUBLIC LAW NO. 99-625 REQUIRES THE SERVICE TO IMPLEMENT THE MANAGEMENT ZONE'S PROTECTIONS

A. Having Accepted the Authority Granted in the Statute, the Service Must Implement the Statute's Mandated Protections

As explained above, Congress' purpose in enacting Public Law No. 99-625 was to cement a compromise that had been struck between the Service, environmental groups, and others, including the Fishermen, who could be adversely affected by the new sea otter population. In the Senate debates over the bill, for instance, Senator Chafee explained that "[p]eople have been talking for years about the translocation of California sea otters and the related management of that population. Little progress has been made toward that objective, however, because of intense conflicts among the various interests and government agencies." 3 ER at 339. Public Law No. 99-625 was able to overcome these conflicts because "[m]ost of the interests concerned were

involved in drafting this legislation framework. As a result, the sea otter provision in the House bill represents a consensus approach for proceeding with the proposed translocation." 3 ER at 339.[12]

The statute's text reflects this purpose. It authorizes the Service to establish the new sea otter population. *See* Pub. L. No. 99-625, § 1(b) ("The Secretary *may* develop and implement . . . ." (emphasis added)). However, if it does, the statute imposes mandatory conditions on that authority. *Id*. ("The plan, which *must* be developed by regulation . . . *shall* include . . . ." (emphasis added)).

The conditions include the specification of a management zone. *Id*. § 1(b)(4).[13] "The purpose" of this zone is to "facilitate the management of sea otters and the containment of the experimental population within the translocation zone" and "to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone[.]" *Id*. To achieve this purpose, the statute commands the Service to use all feasible, nonlethal means to remove any sea otters found within this

[12] *See also* 3 ER at 340 ("In fact, most of the concerned interest groups have had a hand in drafting this language. It represents a consensus approach for proceeding with the proposed translocation.").

[13] *See also* 3 ER at 340 ("A management zone also would have to be designated.").

zone. *Id*. ("The Service *shall* use all feasible nonlethal means and measures to capture any sea otter found within the management zone . . . ." (emphasis added)).[14]

The statute also exempts incidental take of sea otters within the management zone from the Endangered Species and Marine Mammal Protection Acts. *Id*. § 1(c)(2) ("[A]ny incidental taking of [a sea otter] during the course of an otherwise lawful activity within the management zone, *may not* be treated as a violation of the [Endangered Species] Act or the Marine Mammal Protection Act[.]" (emphasis added)). This provision protects the Fishermen from civil and criminal penalties should their activities accidentally affect a sea otter and from citizen suits to enjoin them from pursuing their occupations. *See, e.g.*, 16 U.S.C. § 1540(a), (b), (g) (imposing penalties for violating the take prohibition and authorizing citizen suits to enjoin take).

The management zone's protections are not limited to otters that wander away from the new population. The statute specifies that "[*a*]*ny* sea otter found within the management zone"—which would include otters from an expanding parent population—"*shall* be treated as a member of the experimental population." Pub. L. No. 99-625, § 1(b)(4)(B); *see* 3 ER at 339-40.

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[14] *See also* 3 ER at 340 ("In order to carry out this directive, the Service is expected to conduct research to refine the most effective and humane methods for containing sea otters.").

In a section appropriately titled "Implementation of Plan," the statute commands the Service to implement the plan, including the requirements to protect the surrounding fishery and fishermen, after a brief interval to allow for any consultation under Section 7 of the Endangered Species Act.[15] Pub. L. No. 99-625, § 1(d) ("The Secretary *shall* implement the plan" after April 1, 1986, or after concluding any consultations requested before that date. (emphasis added)). This is a key provision of the statute, which, according to the legislative history, was intended to "provide increased certainty for all parties involved[.]" 3 ER at 339.[16] It does this by mandating that, if the Service proceeds, it must implement the plan's protections once the consultation window closes.

Congress intended Public Law No. 99-625's requirements to endure. As just mentioned, the statute commands that the Service "shall implement" the statute's protections. *See* Pub. L. No. 99-625, § 1(d). "Shall" is unambiguous. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007) ("By its

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[15] CBD argues that this provision does not mandate implementation of the plan, but rather forbids implementation until after the consultation period concludes. But if that's what Congress meant, it would have said, "The Secretary *may* implement the plan *once*" the consultation period concludes. Instead, Congress said "[t]he Secretary *shall* implement the plan . . . *after*" the consultation period concludes. Pub. L. No. 99-625, § 1(d); *see Lopez v. Davis*, 531 U.S. 230, 240 (2001) (rejecting an interpretation that conflates "shall" with "may"). This is a mandatory obligation that applies at all times after the consultation period.

[16] *See also* 3 ER at 340 (the provision "inject[s] as much certainty into the translocation decisionmaking process as possible").

terms, the statutory language ['shall'] is mandatory . . . ."). When Congress uses this term, it "impose[s] discretionless obligations." *Lopez*, 531 U.S. at 241. The Service's interpretation effectively treats Congress' use of "shall," instead of "may," repeatedly throughout the statute as having no significance. *See id*. at 240 (rejecting an interpretation that conflates "shall" with "may"). By conditioning the Service's authority to establish a new sea otter population on requirements that it "must" adopt a regulation, which "shall" include a management zone, from which the Service "shall" remove sea otters using feasible, nonlethal means and incidental take "may not" be treated as a violation of the Endangered Species Act, Congress has directly spoken to the question at issue here. *See* Pub. L. No. 99-625. And the Service's contrary interpretation is unreasonable. These obligations are unambiguous. They are mandatory and discretionless, leaving the Service no authority to unilaterally disclaim them.

The statute's express exemption of ongoing implementation of its requirements from the Endangered Species and Marine Mammal Protection Acts reinforces the conclusion that Congress intended the statute's obligations to endure. It provides that

> [f]or purposes of implementing the plan, *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) (emphasis added). Once again, the legislative history supports that statute's clear text. *See* 3 ER at 339 (the statute "is a freestanding provision based on concepts similar to the Endangered Species Act"); *id*. ("As a freestanding provision, the framework established for the protection and management of the translocated sea otter population would continue in effect even if the species recovers to the point where it can be taken off the Endangered Species Act list."); 3 ER at 341 ("The sea otter management/protection directives set forth in [the statute] would have continued applicability should the species recover to the point where it can be delisted.").

Congress' subsequent amendment of the Marine Mammal Protection Act, which relaxed the restrictions on incidental take during commercial fishing operations, also reinforces this conclusion. *See* 16 U.S.C. § 1387(a). California sea otters were expressly exempt from this reform because Congress wished for their incidental take to continue to be governed by Public Law No. 99-625. *See id*. § 1387(a)(4) ("This section shall not govern the incidental taking of California sea otters and shall not be deemed to amend or repeal [Public Law No. 99-625]."); *see also* H. Rep. 103-439 (Mar. 21, 1994) (explaining that sea otters were exempt from this reform because "[t]aking of California sea otters is regulated under Public Law 99-625"). If the Service may freely invalidate the statute's incidental take exemption, the Fishermen would be subject to uniquely inflexible regulatory restrictions—since they cannot

enjoy the benefits of the subsequent amendment of the Marine Mammal Protection Act—despite every indication that Congress intended the opposite result.

All of the predicates for the statute's mandatory obligations have been satisfied. The Service has established a population of sea otters in Southern California. 3 ER at 226-63. That population remains there to this day. 2 ER at 63. And, obviously, it is long past April 1, 1986, the date after which the statue says that the Service "shall implement" its protections. Pub. L. No. 99-625, § 1(d). Therefore, the Service cannot ignore or unilaterally disclaim compliance with the mandatory obligations that the statute imposes, including the implementation of the management zone's protections.

B. The Service's Contrary Interpretation Conflicts with the Statute's Text and Purpose

The Service argues that, despite the statute's repeated use of mandatory language, it has discretion to decide whether to comply. It bases this argument on the statute's provision authorizing the Service to develop and implement the plan. *See* Pub. L. No. 99-625, § 1(b) ("The Secretary *may* develop and *implement* . . . a plan for the relocation and management of a population of California sea otters . . . ."). As explained above, this gave the Service authority to establish the new population and was necessary to overcome a conflict with the Marine Mammal Protection Act. It does not nullify the statute's multiple mandates. The Service's interpretation impermissibly reads all of this mandatory language out of the statute and is therefore unreasonable.

See Lopez, 531 U.S. at 240-41 (rejecting an interpretation that conflates "shall" with "may"); *United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1247-48 (9th Cir. 2014) (courts must interpret statutes "to give effect to all provisions and not render any part surplussage").

In the Service's view, because it had the initial decision to accept the compromise, it remained free to disclaim the statute's mandates at any time. In effect, the statute does not cement a mutually beneficial compromise. Instead, the Fishermen were hoodwinked; the Service's obligations could be unilaterally terminated, at any time, in the Service's discretion.[17] As explained above, this interpretation cannot be squared with the text and purpose of the statute.

The Service bases its interpretation on an alleged rule that, anytime an agency has discretion to initiate a program, it must have discretion to terminate it and any obligations imposed on the agency as a result of it. The Service asserts that this rule is supported by a single D.C. Circuit decision and decisions from several district courts. *See Commonwealth of Pa. v. Lynn*, 501 F.2d 848, 855-56 (D.C. Cir. 1974); *Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005); *United States v. McLean*, No. CR 03-30066-AA, 2005 WL 2371990 (D. Or. Sept. 27, 2005); *Herrera v. Riley*,

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[17] The statute does not mention any authority to terminate the management zone's protection and, consequently, imposes no constraints on that authority (if it exists). Therefore, if the Service's interpretation is correct, it could have terminated the protections immediately after the new population was established, simply because it thought that would be better for the otter's recovery.

886 F. Supp. 45 (D.D.C. 1995). None of these cases support the broad rule that the Service asserts here. None interpreted any statute at issue here. None interpreted a statute that expressly compelled implementation, like Public Law No. 99-625's "shall implement" requirement. *See Castellini*, 365 F. Supp. 2d at 200-01; *McLean*, 2005 WL 2371990, at *3. And the D.C. Circuit's decision in *Lynn* actually rejects the Service's rule. Unlike here, that case interpreted a statute that contained only permissive language. Nevertheless, the D.C. Circuit determined that the "argument from the non-mandatory language of the statutes is not conclusive standing alone." *Lynn*, 501 F.2d at 854.

Obviously, none of these cases are binding on this Court. Thus, even if the cases do support the Service's rule, this Court should reject it. The rule the Service asserts simply makes no sense. There are many reasons why Congress might want to give an agency discretion to initiate a program while imposing long-term, mandatory obligations, if it does. It might, for instance, be trying to cement a compromise where the agency gets its benefits of the bargain up front but the other side only benefits if the mandates are implemented over the long term.

That's the situation here. The Service enjoyed its benefit of the compromise when it exercised its authority to establish the new sea otter population. The Fishermen, and others who work and play in Southern California waters, only enjoy their benefit of the compromise if, having established the population, the Service

continues to implement the protections. Otherwise, they face precisely the result the statute was intended to avoid—a sea otter population has been established in Southern California with no protections for the surrounding fishery.

In many ways, this situation is akin to a land use permit. Routinely, development permits include conditions requiring mitigation or ongoing management to reduce the impacts of development. Though the permittee has the choice whether to accept a permit, subject to such conditions, she does not generally have the right to accept the permit, enjoy the benefits of it (by building her project), then later refuse to comply with the conditions. *See, e.g.*, *County of Imperial v. McDougal*, 19 Cal. 3d 505, 510-11 (1977). This is true even if the project proves to be less profitable than the permittee originally hoped.

For the same reasons, the statute should not be interpreted to allow the Service to establish a sea otter population on San Nicolas Island then later refuse to comply with the conditions that Congress put on that authority.

1. The Service's Interpretation Raises a Significant Constitutional Question

If the text of the statute did not foreclose the Service's interpretation, this Court would have to reject it anyway to avoid a serious constitutional question. Under the avoidance canon, an interpretation that raises a serious constitutional question must be rejected in favor of one that does not. *See Rodriguez v. Robbins*, 715 F.3d 1127,

1133-34 (9th Cir. 2013). Because the statute does not expressly authorize the Service to terminate the management zone's protections—and therefore does not provide any criteria to guide the Service's decision to do so—the Service's interpretation raises a constitutional question under the nondelegation doctrine. *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989); *see also United States v. Richardson*, 754 F.3d 1143, 1145-46 (9th Cir. 2014).

Under the nondelegation doctrine, Congress cannot constitutionally delegate power to an administrative agency unless it provides an "intelligible principle" to guide the exercise of that power. *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 474 (2001); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). At a minimum, where—as here—a statute gives no guidance as to how power should be wielded, the nondelegation doctrine is violated. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 414-16 (1935).

The court below rejected this argument because the Service's decision was not the byproduct of "unconstrained discretion." 1 ER at 14. It appears that the court relied on the failure criteria that the Service adopted in the 1987 regulation as the intelligible principle. *See id*. This was clearly in error. An agency cannot cure a nondelegation doctrine problem by tying its own hands. *See Whitman*, 531 U.S. at 472-73. It can't provide itself with the requisite intelligible principle; only Congress can.

Congress didn't provide any intelligible principle to guide the Service's decision to terminate the management zone's protections after establishing the population. There is no mention of any such authority in the statute. Consequently, nothing in the statute identifies any criteria to guide its exercise.

Below, the Service argued that this was no matter because a congressman once suggested that the Service should have this authority. As Senator Chafee said during the Senate debates on Public Law No. 99-625, "[p]eople have been talking for years about the translocation of California sea otters" to no avail. 3 ER at 339. One of those people was Congressman Breaux, who sponsored an earlier bill to authorize the Service to establish a sea otter population, a bill which ultimately failed. *See* 3 ER at 293-95. During the debates over the failed bill, Congressman Breaux said:

> Much of the discussion of management of the sea otter within the translocation zone assumes the successful translocation of an experimental population of sea otters. The Service should specify in the section 5(b) plan what would constitute a successful translocation. . . . If the Service determines that the translocation is not successful, it should, through the informal rulemaking process, repeal the rule authorizing the translocation. Translocated animals should be returned to the parent population. After the rule is repealed, the limiting provisions of the act would not longer apply.

3 ER at 295.

Although Public Law No. 99-625 is nearly identical to the text of that earlier bill, Congressman Breaux's isolated statements cannot provide the required intelligible principle. Isolated statements by a single congressmen are entitled to little

weight. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). At a minimum, they cannot supplant clear statutory text or create ambiguity where there isn't any. *See Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995). That's particularly true where, as here, the congressman's statement was made outside of the deliberations for the bill that was ultimately enacted. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 835-36 (9th Cir. 1996) (legislative history that is not contemporaneous to a bill's enactment merits little weight). Furthermore, Representative Breaux did not explain where in the text of the statute this power is conferred. *See* 3 ER at 293-95. Indeed, the termination decision is inconsistent with Congressmen Breaux's statement, since it left the otters on San Nicolas Island. One can only speculate, but Congressman Breaux's suggestion that the Service could relieve itself of its statutory obligations may be why that earlier bill failed. In any event, nothing in the legislative history for Public Law No. 99-625 or, more importantly, the statute's text provides an intelligible principle for the Service's claimed authority.[18]

[18] The Endangered Species Act's "whatever the cost" approach to protecting species also cannot provide the intelligible principle, since Public Law No. 99-625 expressly exempts implementation of its requirements from that statute. *See* Pub. L. No. 99-625, § 1(d).

2. A Literal Interpretation of the Statute Is Not Absurd

The court below adopted the Service's interpretation of the statute because, in its view, it would be "absurd" to construe the statute contrary to the Endangered Species Act's "whatever the cost" approach to protecting species. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). In doing so, the court misapplied the high threshold for disregarding a statute's text as absurd, the statute's express provision exempting the implementation of its protections from the Endangered Species Act, and that the allegedly absurd result cannot occur under the statute.

Absurdity is a high bar. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (interpreting a statute to avoid "patently absurd consequences" is a "narrow exception to our normal rule of statutory construction" (quoting *United States v. Brown*, 333 U.S. 18, 27 (1948)). When a straightforward reading of a statute leads to a rational result, even if competing policy goals could have also been rationally balanced differently, "an alteration of meaning is not only unnecessary, but also extrajudicial." *See Arizona State Bd. for Charter Schools v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006).

The statute's text does not lead to absurd results. Simply put, balancing sea otter recovery and its impacts on individuals is a quintessential example of rationality, not a "patently absurd consequence." *See Public Citizen*, 491 U.S. at 470 (Kennedy, J., concurring); *cf. Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("One would not say

that it is even rational [to ignore the costs of regulation]."). Therefore, even if there was a conflict between the statute and the Endangered Species Act's "whatever the cost" approach, the mere fact that Congress weighed competing policy goals differently for this statute would not be absurd.

To hold otherwise would require reversal of the Supreme Court's decision in *National Association of Home Builders*, 551 U.S. 644 (2007). That case held that Section 7 of the Endangered Species Act—the provision relied upon by the court below—does not supersede mandatory obligations imposed under other statutes, but only applies to discretionary actions undertaken by an agency. *See id*. at 661-68. Public Law No. 99-625 uses the same mandatory language at issue in *Home Builders*—"shall." *See id.* at 650.

The premise of the absurdity argument is also unsupportable. Congress expressly resolved any potential conflict between implementation of Public Law No. 99-625's protections and the Endangered Species Act. In Section 1(f) of the statute, Congress provided that "for purposes of implementing the plan, *no* act" of the Service to relocate or manage a sea otter "may be treated as a violation of *any* provision" of the Endangered Species or Marine Mammal Protection Acts. *See* Pub. L. No. 99-625, § 1(f) (emphasis added). The only reasonable interpretation of this is that the statute's protections cannot be avoided by citing alleged conflicts between them and the other statutes. This was no inadvertent drafting error. Therefore, even if the Court believes

that Congress' decision to depart from the Endangered Species Act's "whatever the cost" approach was unwise, it cannot disregard the statute's text. *See Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 872 (9th Cir. 1981) (absurdity should only be used to disregard clear statutory text if an absurd application has nothing to do with the underlying purpose of the statute).

The Service's absurdity argument is based on its conclusion that capturing and removing otters from the management zone could jeopardize the species. This finding was based on the high mortality rate associated with capturing and relocating otters. 2 ER at 65-66; *see* 2 ER at 106. However, the Service's argument, once again, completely ignores the statute's text. Public Law No. 99-625 requires the Service to contain otters using "feasible, non-lethal means." Pub. L. No. 99-625, § 1(b). Because the statute is limited to nonlethal means, it doesn't require the Service to use the lethal means that, according to it, could jeopardize the species.

There's also no conflict between the Endangered Species Act and the statute's incidental take exemption. The Endangered Species Act doesn't prohibit the take of the sea otter, regardless of whether it is incidental or intentional. The Endangered Species Act only forbids the take of *endangered* species. 16 U.S.C. § 1538.[19] The sea

[19] The Endangered Species Act permits the Service to regulate the take of threatened species by regulation. 16 U.S.C. § 1533(d). But it would not be inconsistent with the statute—much less absurd—for incidental take of a threatened species to remain unregulated.

otter is listed as threatened, not endangered. 42 Fed. Reg. at 2968; *see* 16 U.S.C. § 1532. Therefore, it is entirely consistent with the Endangered Species Act for Congress to exempt incidental take of the sea otter and by no means absurd.

CONCLUSION

If the Service believes that the balance struck between the sea otter's recovery and the protections for Southern California's fishery should be reconsidered, it should direct those concerns to Congress. It is not free to simply ignore mandatory, discretionless obligations that Congress has imposed on it.

For what it's worth, Congress has considered several recent proposals to repeal Public Law No. 99-625.[20] Despite the Service's recent actions, Congress has rejected each of those proposals. This suggests that Congress, at least, continues to support the compromise's careful balance between the interests of the sea otter and those who work and play in the surrounding fishery.

[20] *See* H.R. 1735, 114th Cong. § 313(c) (2015-2016) (proposing to repeal Pub. L. No. 99-625); S. 1376, 114th Cong. § 313(c) (2015-2016) (same); S. 1118, 114th Cong. § 304(c) (2015-2016) (same); S. 2289, 113th Cong. § 315(c) (2013-2014) (same); S. 2410, 113th Cong. § 353(c) (2013-2014) (same); H.R. 1960, 113th Cong. § 320(c) (2013-2014) (same).

This Court should reverse the decision below. The Fishermen's petition must be granted to conform the agencies' conduct to the requirements of Public Law No. 99-625.

DATED: April 5, 2016.

Respectfully submitted,

M. REED HOPPER
JONATHAN WOOD

By /s/ Jonathan Wood
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Counsel for Plaintiffs-Appellants

STATEMENT OF RELATED CASE

Also pending before this Court is *Cal. Sea Urchin Comm'n v. Rachel Jacobson*, No. 14-55580 (briefing completed Dec. 5, 2014). In that case, many of the plaintiffs in this one directly challenged the rule terminating the sea otter management zone. The case was dismissed on statute of limitations grounds and only that issue is before this Court on appeal. Oral argument in that case is scheduled for oral argument on May 6, 2016.

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DATED: April 5, 2016.

/s/ Jonathan Wood
Attorney for Plaintiffs-Appellants

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