No. 17-55428

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA SEA URCHIN COMMISSION, et al.,

Plaintiffs - Appellants,

v.

VIRGINIA JOHNSON, in her official capacity as
Principal Deputy Assistant Secretary for Fish & Wildlife & Parks, et al.,

Defendants - Appellees,

FRIENDS OF THE SEA OTTER, et al.,

Intervenor - Defendants - Appellees.

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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs - Appellants hereby state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF SUBJECT MATTER JURISDICTION

This appeal arises from the district court's judgment granting the Defendants' and Defendant-Intervenors' motions for summary judgment. 1 ER at 2. The district court had subject matter jurisdiction pursuant 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 March 3, 2017, is a final judgment under Rule 54(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE ISSUES

1. When Congress codified a compromise in Public Law 99-625—which authorized the Service to establish a new sea otter population on the condition that it implement protections for the surrounding fisheries and the fishermen who work in them—did it implicitly give the Service power to accept the new authority but later disclaim compliance with the conditions Congress placed on that authority?

STATUTORY PROVISIONS

1. 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 the sea otters will be captured, translocated, released, monitored, and protected.

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

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

(A) surrounds the translocation zone; and

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

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

otter found within the management zone and return it to either the translocation zone or to the range of the parent population.

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

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

2. 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.

3. 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.

4. 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

When Congress clearly expresses its intent in the plain language of a statute, federal agencies—and the courts—must give it effect. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984). In Public Law No. 99-625, Congress endowed the Service with discretionary authority to establish a new population of southern sea otters, but explicitly conditioned that authority on several protections for the surrounding fishery and those who work in it. *See* 2 ER at 88-90. This compromise reflects Congress' recognition that introducing sea otters into Southern California's waters could severely impair the health and sustainability of the local fisheries, as well as threaten the livelihoods of those who depend on them.

The conditions of this compromise are clearly mandatory. The Statute repeatedly says that, if the Service chooses to exercise the authority granted by the statute, it "shall" or "must" also adopt the protections by regulation. 2 ER at 88. For good measure, the statute also expressly commands that the Service "shall implement" them. 2 ER at 89. In spite of these clear directives, and with nothing in the statute authorizing it, the Service nevertheless adopted a final rule terminating the protections. *See* 2 ER at 59-61.

The Service contends that the discretion to implement the program implicitly includes the discretion to terminate the program and the mandatory protections. Not only is this interpretation of the statute entirely self-serving—the Service established a growing, thriving population of otters at San Nicolas Island and now seeks to abandon its obligations under the compromise—it is unreasonable. The statute cannot be interpreted to grant the Service such broad authority without undermining the plain text of the statute and Congress' intent in enacting it, or without conflicting with the doctrine of constitutional avoidance. The rule purporting to terminate the management zone's protections exceeds the Service's authority under the statute and is invalid. *See* 5 U.S.C. § 706.

B. Background

1. The Southern Sea Otter

The southern sea otter is a protected species under the Endangered Species and Marine Mammal Protection Acts. 2 ER at 72. By the early twentieth century, sea otter populations were dramatically reduced by the commercial fur trade, and state and federal law prohibited sea otter hunting by 1913. 2 ER at 78. Despite a considerable comeback by the early 1980s, the southern sea otters' numbers and range remained limited, such that the Service was concerned that the entire species could be at risk from a single, catastrophic oil spill. 2 ER at 72; 2 ER at 78. The Service determined that the most effective way to preserve the species would be to establish a new colony of sea otters in the Channel Islands, far enough away from the existing population that one spill would not affect both. 2 ER at 72.

The Service's plan proved controversial, because sea otter expansion into Southern California waters would place nearby fisheries, and the livelihoods of those who depend on them, in peril. *See* 2 ER at 75;

see also 2 ER at 91-92.[1] Sea otters are voracious predators that consume vast quantities of sea urchin, abalone, and lobster. 2 ER at 73-74. Beyond their negative impact on fishery resources, the mere presence of sea otters presents a concern for those who make a living in Southern California's waters. The Endangered Species and Marine Mammal Protection Acts contain broad prohibitions against the "take" of protected species. *See* 16 U.S.C. § 1538(a); 16 U.S.C. § 1371(a). The definition of take includes capturing or harassing a protected species, even by accident. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 690 (1995). If a sea otter crawls inside a lobster trap, for example, a fisherman could face substantial civil and criminal penalties, including imprisonment. 2 ER 93-94; 16 U.S.C. § 1538(a); 16 U.S.C. § 1371(a). The pursuit of his occupation could be hampered, and perhaps even enjoined, through citizen suits aimed at preventing take. 16 U.S.C. § 1540(g).

[1] Because the legislative history is not readily available online, the relevant legislative history, which was attached to the Fishermen's memorandum below, is included in the excerpts of record.

2. Public Law No. 99-625 and the Translocation Program

Because the Marine Mammal Protection Act prohibits trapping and moving otters, the Service's proposed translocation program required legislative authorization. 2 ER at 61. To balance concerns about the threats to fisheries with the promotion of sea otter recovery, Congress passed Public Law No. 99-625, which codified a compromise among the Service, the state, conservation groups, fishermen, and other affected interests. 2 ER at 88-90. The statute authorizes the Service to relocate southern sea otters beyond their then-existing range. 2 ER at 88. But the statute requires the Service also to maintain a management zone around the translocated population of otters, to protect surrounding fisheries. 2 ER at 88-89. The statute directs the Service to remove otters that stray into the management zone, using all feasible, nonlethal means, and exempts otherwise lawful activities within the zone, including fishing, from the Endangered Species and Marine Mammal Protection Acts' take prohibitions. 2 ER at 89. The Service accepted the terms of this compromise by adopting a regulation establishing a new population of sea otters at San Nicolas Island. *See* 2 ER at 80-81. Consistent with the statute's requirements, the Service also established the required management

zone—which extends south from Point Conception to the Mexican border—and incorporated the statutorily mandated protections into the regulation. 2 ER at 80-86.

The regulation also asserted that the Service might someday decide to annul the management zone's protections. 2 ER at 87. The regulation identified several criteria that could lead it to take this step: (1) whether, after a year or more, no otters remained at San Nicolas Island and the reason for emigration or mortality could not be identified and/or remedied; (2) whether, within three years, fewer than 25 otters remained and the reason for emigration or mortality could not be identified and/or remedied; (3) whether, two years after the Service stopped moving otters to San Nicolas Island, the population was declining at a significant rate and not reproducing; (4) whether dispersal of otters into the management zone was sufficient to demonstrate that containment is impossible; and (5) whether the health and well-being of the experimental population was threatened to the point that continued survival is unlikely. *See* 2 ER at 87. If any of these criteria were met, the Service would evaluate the potential causes of the failure and, if they could be addressed, would decide whether to continue the program or declare it a failure. 2 ER at 87. If the program were

declared a failure, any remaining otters at San Nicolas Island or within the management zone would be returned to the parent population. 2 ER at 87.

Between 1987 and 1990, 140 southern sea otters were released at San Nicolas Island. *See* 2 ER at 72. Many of those animals returned to the parent population, moved into the management zone, or died from the stress of the translocation. 2 ER at 72. In 1991, the Service prematurely stopped moving otters to San Nicolas Island. 2 ER at 62. Consequently, the population at San Nicolas Island was initially smaller than anticipated. From 1987 to 1993, the Service captured otters that wandered into the management zone and returned them to the parent population. 2 ER at 62. The Service suspended that practice in 1994, because there were no feasible, nonlethal means of capturing and relocating the sea otters. 2 ER at 63. In the late 1990s, a large population of sea otters began seasonally moving south of Point Conception into the management zone, which it has continued to do ever since. 2 ER at 77.

3. Termination of the Translocation Program

In 2012, the Service adopted a final rule terminating the program and purportedly relieving itself of its obligations under the statute. *See* 2 ER at 59. Relying on its assertion of authority in the 1987 regulation, the

Service concluded that the second failure criterion had been met: three years after the program's inception, fewer than 25 sea otters remained at San Nicolas Island. 2 ER at 59. The Service explicitly gave no consideration to the current state of the San Nicolas Island population when making this determination. 2 ER at 68. By 2012, that population included approximately fifty adult sea otters and their pups, and was healthy and growing at an annual rate of seven percent. *See* 2 ER at 67. Although the threat to local fisheries remained, the Service declared that all the management zone's protections would cease and that the exemption from take liability would no longer apply. 2 ER at 67-68. Despite relying on the assertion of authority in the regulation as its sole basis to terminate the program, the Service chose to leave the otters on San Nicolas Island, in clear violation of the regulation's requirements. 2 ER at 67; 2 ER at 69.

C. Procedural History

In July 2013, the Fishermen filed suit challenging the final rule terminating the management zone's protections. The Service successfully moved to dismiss the case on statute of limitations grounds, and the Ninth Circuit reversed on appeal. *See Cal. Sea Urchin Comm'n v. Jacobson*, No.

CV 13-05517-DMG (CWx), 2014 WL 948501, at *8 (C.D. Cal. Mar. 3, 2014); *Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1048 (9th Cir. 2016). On remand, the court below held that the Fishermen had standing to challenge the regulation. 1 ER at 10. However, the court further held that the Fishermen could not prevail on the merits, finding that the Service's interpretation of Public Law 99-625 was reasonable and permissible.[2]

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). Summary judgment is appropriate when there is no genuine dispute as to any material fact and a party can show that it is entitled to judgment as a matter of law. Fed R. Civ. P. 56. The facts underlying the Fishermen's Administrative Procedure Act claim must be

[2] After this case was dismissed, the Fishermen filed a petition under the Administrative Procedure Act seeking the restoration of the management zone, which the Service denied. The Fishermen challenged the denial of their petition, but the district court granted summary judgment to the government. *See Cal. Sea Urchin Comm'n v. Bean*, No. CV 14-8499-JFW (CWx), 2015 WL 5737899, at *9 (C.D. Cal. Sept. 18, 2015). The Fishermen's appeal of that decision remains pending before this Court and oral arguments for the two cases has been consolidated.

in the administrative record compiled by the Service. *See Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). Consequently, no material facts are in dispute and summary judgment is appropriate. *See id.* at 1472.

Under the Administrative Procedure Act, a final agency action is invalid if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (agencies may not exercise authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law") (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

ARGUMENT

I

THE FISHERMEN HAVE STANDING TO CHALLENGE THE REGULATION

To invoke the jurisdiction of the federal courts, a plaintiff must satisfy Article III's standing requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To do so, (1) a party must have suffered an injury in fact; (2) the party must demonstrate a causal connection between the injury and the challenged action; and (3) it must

be likely that a favorable decision will redress the injury. *Id.* at 560-61.

The court below correctly held that the Fishermen have standing to challenge the Service's termination of the management zone, recognizing their clear interests in the health and sustainability of Southern California's fisheries. 1 ER at 10. Because the introduction of sea otters has, and will continue, to cause declines in populations of sea urchin, abalone, lobster, and other shellfish, the removal of the Service's unlawful regulation would be a critical first step in redressing this injury to the Fishermen. *Id.*

The Fishermen also have standing as the objects of the regulation, although the court below incorrectly disagreed. 1 ER at 7. The termination decision directly regulates the fishermen. By eliminating the statute's exemption for incidental take within the management zone, the decision alters the legal status of their work and exposes them to civil and criminal liability—as well as lawsuits from environmental groups. For these reasons, the Fishermen have standing to challenge removal of the protections.

A. The Fishermen Have Standing Based on Their Interests in the Fisheries

The lower court correctly recognized the Fishermen's standing based on their interests in the fisheries, which is precisely what Congress sought to protect with the management zone. *See* 2 ER at 88-90; *see also* 1 ER at 10.

The Service's unlawful termination of the management zone's protections is an absolute and permanent barrier to protecting the fisheries. Unchecked expansion of sea otter populations threatens the fisheries on which the Fishermen's businesses depend. For some, otter expansion threatens to end careers that have spanned over three decades. *See*, *e.g.*, 2 ER at 57 ¶ 3; 2 ER at 46 ¶ 3; 2 ER at 43 ¶ 3. The sea otter's increasing presence has the potential to severely hamper important sectors of Southern California's commercial fishing industry, as well as put many of the Fishermen out of work.

The Service's termination of its management zone obligations also harms the Fishermen by undermining their efforts to conserve and restore the fisheries. Sea otters have reduced, and will continue to reduce, sea urchin and shellfish populations in the management zone. *See* 2 ER at 46 ¶¶ 4-5; 2 ER at 43 ¶¶ 4-5; 2 ER at 40 ¶¶ 5-6. This impairs the California

Sea Urchin Commission's and the Commercial Fishermen of Santa Barbara's interests in promoting healthy and sustainable fisheries to support California's rich fishing tradition well into the future. *See* 2 ER at 54-55 ¶¶ 6, 9; 2 ER at 50 ¶¶ 13, 17. It also undermines the California Abalone Association's efforts to restore abalone populations to viable levels so the fisheries may someday be reopened to commercial abalone harvesting. 2 ER at 50 ¶ 14.

These injuries would be adequately redressed by the Fishermen's requested relief. If the Fishermen prevail, it would restore the Service's obligation to comply with the statute and use any feasible, nonlethal means to remove sea otters from the management zone. Although the restoration of this obligation would not immediately and fully solve the problem, the Ninth Circuit has made clear that a plaintiff "is not required to solve all roadblocks simultaneously and is entitled to tackle one roadblock at a time." *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012) (citation omitted); *see also Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261-62 (1977) (developer could challenge racially discriminatory zoning decision despite no guarantee that the project would ultimately be built, even if

the challenge was successful); *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (holding that a favorable decision need not relieve a plaintiff's every injury because the redressability requirement is satisfied if a favorable decision would relieve one discrete injury).

If the Fishermen prevail, they will restore the Service's obligation to use any feasible, nonlethal method to enforce the management zone or demonstrate, on an ongoing basis, that such means are not available. *See* 2 ER at 92 ("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."). This is a significant "change in a legal status"—from the Service having no obligation to respect the statute's requirements to a mandatory obligation to do so—that directly affects the likelihood that the ultimate relief will be achieved. *See Novak v. United States*, 795 F.3d 1012, 1019-20 (9th Cir. 2015). Consequently, the Fishermen's claim will sufficiently redress the injuries to the fishery. They therefore have standing to challenge the Service's final rule terminating the management zone's protections.

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

Although the Fishermen's interest in the fishery is sufficient to confer standing, they also have standing to challenge the terminated decision for another reason—they are the "object of the government action" being challenged. As the Supreme Court has recognized, standing is easily established by the "object of the government action or inaction" being challenged. *Lujan*, 504 U.S. at 562. This Court has explained that "a plaintiff is *presumed* to have constitutional standing to seek injunctive relief when it is the direct object of regulatory action challenged as unlawful." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 655 (9th Cir. 2011) (emphasis added). A plaintiff is the object of a given regulation when the regulation "alters his rights, obligations, privileges, powers, or liabilities." *See Desert Water Agency v. U.S. Dep't of the Interior*, 849 F.3d 1250, 1254 n.3 (9th Cir. 2017).

The object of a regulation is presumed to have standing because he necessarily has "a personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Supreme Court has recognized that "there is no question" of parties' standing when a "regulation 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." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967). Regulated parties are not bystanders raising abstract concerns;[3] they are directly controlled by the regulation and threatened with harm if they do not conform. As the Supreme Court held in *Abbott Labs.*, the standing requirement is satisfied when a regulation forces a party to choose between altering his behavior and facing liability.

The Fishermen are the objects of the regulation at issue here. Before the 2012 regulation, and pursuant to the requirements of Public Law 99-625, the Fishermen—most of whom have worked and dived in the management zone for over thirty years—were able to pursue their livelihoods free from concern that their lawful activities could be subject to ESA or MMPA liability. *See* 2 ER at 54 ¶ 9; 2 ER at 50-52 ¶¶ 4, 19, 23, 24; 2 ER at 57 ¶ 3; 2 ER at 46 ¶ 3; 2 ER at 40 ¶ 4. The rule terminating the management zone alters the Fishermen's rights, privileges, and liabilities under Public Law 99-625 by removing the take exemption, requiring them

[3] *Cf. Baker*, 369 U.S. at 204 (the standing requirement's purpose is to weed out would-be plaintiffs with no personal stake in the outcome of a case).

to change their fishing practices to avoid encountering otters or risk incidental take. *See, e.g.*, 2 ER at 40-41 ¶ 9 ("As otters have moved south of Point Conception into the management zone, they have reduced the number of areas where there are healthy sea urchin populations that can be harvested without the potential of encountering sea otters."); *see also* 16 U.S.C. § 1538(a); 16 U.S.C. § 1371(a); *Abbott Labs.*, 387 U.S. at 154; *Desert Water Agency*, 849 F.3d at 1254 n.3.

In addition to regulating the Fishermen's activities, the termination decision imposes severe sanctions for noncompliance. If the Fishermen accidentally cause take of a sea otter[4], they could face substantial civil and criminal penalties, as well as citizen suits seeking to enjoin them from pursuing their livelihoods.[5] Any of those could spell the end of a fisherman's

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[4] The extremely broad take prohibition covers, among other things, accidentally swimming or driving a boat too close to a sea otter, as well as accidentally catching one. *See* 16 U.S.C. § 1538(a); 16 U.S.C. § 1371(a); *Sweet Home*, 515 U.S. at 690. The Fishermen's declarations and the Service's Administrative Record show that the prohibition includes many of the Fishermen's ordinary activities. *See* 2 ER at 58 ¶ 11; 2 ER at 54 ¶ 9; 2 ER at 52 ¶ 24; 2 ER at 47 ¶ 10; 2 ER at 44 ¶ 10; 2 ER at 41 ¶¶ 10, 12; 2 ER at 93-94 (incidental take can result from an otter crawling inside a lobster trap).

[5] Such suits are often brought by environmental interest groups. *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*, 161 F. Supp. (continued…)

business. That harm is more than enough to establish the Fishermen's personal stake in this controversy.[6] *See* 2 ER at 58 ¶ 11; 2 ER at 47 ¶ 10; 2 ER at 44 ¶ 10; 2 ER at 41 ¶ 12; *see also Baker*, 369 U.S. at 204. As the objects of the regulation, the Fishermen face a stark choice: abandon their livelihoods, avoid fisheries where sea otters are present, or risk violating the law.

Despite this precedent and evidence, the court below ruled that a party may not challenge the adoption of a new regulation unless he can prove that it will be enforced against him (which is necessarily speculative at the regulation's adoption). 1 ER at 6-7. In requiring such a showing, the lower court relied on *Thomas v. Anchorage Equal Rights Commission*, 220

(…continued) 3d 678 (N.D. Iowa 2016); *Ctr. for Biological Diversity v. Otter*, No. 1:14-CV-258-BLW, 2016 WL 233193 (D. Idaho Jan. 8, 2016); *Cal. River Watch v. Cnty. of Sonoma*, 55 F. Supp. 3d 1204 (N.D. Cal. 2014); *All. 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 Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540 (D. Md. 2009).

[6] Even a dollar of economic harm is an injury-in-fact for standing purposes. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"); *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1029 (8th Cir. 2014) ("The consumers' alleged economic harm—even if only a few pennies each—is a concrete, non-speculative injury.").

F.3d 1134, 1139 (9th Cir. 2000), and *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 773 (9th Cir. 2006). These two cases are inapposite, however, because they did not involve challenges to newly adopted regulations by plaintiffs who were the objects of the regulation and whose standing was presumed. *See Thomas*, 220 F.3d at 1139; *Sacks*, 466 F.3d at 773; *see also L.A. Haven Hospice*, 638 F.3d at 655.

In *Thomas*, the plaintiff challenged a long-extant statute that was not actively enforced. 220 F.3d at 1139. And in *Sacks*, this Court denied standing to a plaintiff challenging a statutory provision under which the government elected not to prosecute, although the plaintiff had clearly violated that provision. 466 F.3d at 773. This Court has never required regulated parties to establish an imminent threat of prosecution to challenge the adoption of an illegal rule.[7] Indeed, this Court routinely hears

[7] It would make little sense to require the Fishermen to demonstrate "a 'concrete plan' to violate the law in question." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d at 1139. The incidental take exemption would not apply if the Fishermen intended to cause take. As the objects of the regulation, all the Fishermen need to prove is that they have and will continue to work in the management zone. This is amply supported in the Fishermen's declarations. *See* 2 ER at 57 ¶ 3; 2 ER at 52 ¶ 24; 2 ER at 46 ¶ 3; 2 ER at 43 ¶ 6; 2 ER at 40 ¶ 3.

challenges brought by regulated parties without even questioning their standing.[8]

The Fishermen's injuries will be redressed by the requested relief. All a plaintiff must show to establish redressability is that the requested relief will result in "change in a legal status" that increases the likelihood the ultimate relief will be achieved. *See Novak*, 795 F.3d at 1019-20 (quoting *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012)); *see also Bennett*, 520 U.S. at 169 (standing is satisfied if the challenged agency action "has a powerful coercive effect" on the cause of the plaintiff's injury). The Fishermen's claim readily satisfies this standard. Restoration of the take exemption would effect a change in legal status that will remove the threat of incidental take liability from the Fishermen's activities. *See* 2 ER at 88-90.

[8] *See, e.g., Arizona ex rel. Darwin v. EPA*, 815 F.3d 519 (9th Cir. 2016); *Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016); *Building Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027 (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).

II

PUBLIC LAW NO. 99-625 UNAMBIGUOUSLY CONDITIONS THE SERVICE'S AUTHORITY TO ESTABLISH A SEA OTTER POPULATION ON THE SERVICE IMPLEMENTING THE MANAGEMENT ZONE'S PROTECTIONS

Congress' purpose in enacting Public Law 99-625 was to codify a compromise between the Service, environmental groups, and others, including the Fishermen, who could be adversely affected by the transplanted otter population. That statutory compromise is evident in the plain language of the statute, and further supported by statutory context and history. The Service's interpretation is inconsistent with Public Law 99-625's text and would undermine the fundamental purpose of the statute, permitting the government to enjoy the benefit of the compromise and then unilaterally relieve itself of its obligations. The result that the Service defends in this case—the establishment of a sea otter population in Southern California where none of the management zone's protections apply—is precisely what the statute forbids.

When interpreting a statute, a court's primary responsibility is to discern Congress' intent in enacting it. *See United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999). This Court reviews statutory interpretation de novo under the two-part framework set forth in

Chevron, U.S.A., Inc. v. Natural Resources Defense Council. 467 U.S. at 843-44. Where Congress has "directly spoken to the precise question at issue . . . that is the end of the matter." *Id.* at 842. If the statute's language is plain and unambiguous, that meaning will control. *See United States v. Carter*, 421 F.3d 909, 911 (9th Cir. 2005). Only if the text of the statute is ambiguous, and its context as well as canons of statutory interpretation do not resolve the question, will courts then consider deferring to an agency interpretation. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 132-33; *see also Chevron*, 467 U.S. at 837; *NRDC v. EPA*, 779 F.3d 1119, 1125-26 (9th Cir. 2015).

A. The Plain Language of Public Law No. 99-625 Requires the Service To Implement the Management Zone's Protections Once It Accepts the Benefit of the Compromise

Public Law No. 99-625 is a straightforward statute designed to balance sea otter recovery against its consequences for Southern California's fishery and fishermen. 2 ER at 88-90. It authorizes the Service to develop and implement a plan for the relocation and management of a population of otters from its existing range to another location. 2 ER at 88-90. However, it imposes several significant conditions on this authority, all of which are clearly defined in the text of

the statute. With this clear statutory text, Congress spoke directly to the question of what must happen if the Service elected to establish a new sea otter population. This Court must give that plain language full effect.

The statute says that the plan "*must* be developed by regulation." 2 ER at 88 (emphasis added). That regulation "*shall* include" a management zone surrounding the new population. 2 ER at 88-89 (emphasis added). The purpose of this zone is "to (i) facilitate the management of sea otters and the containment of the experimental population . . . and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone . . . ." 2 ER at 89. To effectuate that purpose, the statute commands that the Service "*shall*" treat any otter found within the management zone "as a member of the experimental population" and "*shall* use all feasible non-lethal means and measures" to capture them and remove them from the zone. 2 ER at 89 (emphasis added). The statute also provides that "any incidental taking of [an otter] during the course of an otherwise lawful activity within the management zone[] *may not* be treated as a violation of the [Endangered Species Act] or the Marine Mammal Protection Act of 1972." 2 ER at 89 (emphasis added). This exemption was designed to

protect fishermen and others who pursue their livelihoods in Southern California's waters. *See* 2 ER at 88-90. And, finally, under a provision appropriately titled "Implementation of Plan," the statute provides that, if the Service accepts the authority to establish the new sea otter population, it "shall implement" the regulation, including the management zone's protections, after performing any requested consultations, or April 1, 1986, if no consultations are requested. 2 ER at 89.

The statute's several "musts" and "shalls" impose unambiguous obligations on the Service to implement the management zone's protections once it accepts the authority to establish a sea otter population in Southern California. "Shall" is unambiguous. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) ("By its terms, the statutory language ['shall'] is mandatory . . . ."). It imposes an absolute requirement. *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (Congress' "use of a mandatory 'shall' . . . impose[s] discretionless obligations."). The Service accepted the authority granted in the statute by establishing a population of otters on San Nicolas Island. *See* 52 Fed. Reg. 29,754 (Aug. 11, 1987). Thenceforth, the statute bound the Service

to implement the statutory protections for the management zone. *See* 2 ER at 88-89. The statute does not provide for this obligation to expire at any time. 2 ER at 88-90. Rather, it creates an ongoing obligation from the end of consultation or April 1, 1986. By accepting the authority to move sea otters to San Nicolas Island, the Service became bound by the discretionless obligation to implement the management zone's protections.

The Service and the court below incorrectly focused on whether Congress spoke directly to the "question of whether the [Service] has authority to terminate the Translocation Plan."[9] 1 ER at 13; *Chevron*, 467 U.S. at 844. In other words, the court assumed an agency can do anything unless Congress expressly forbade it—even if nothing in the statute would authorize the agency's actions in the first place. This is the wrong question. Instead, the Court should determine whether Congress spoke directly to what the Service shall or must do if it accepts the statutory authority to establish the San Nicolas Island sea otter population.

[9] The lower court found that the language cited by both parties was too general to conclude that Congress spoke directly to this question. It proceeded to examine whether the Service's interpretation of Public Law 99-625 is reasonable.

Congress did, in the plain language of the statutory text: if the Service moves otters to Southern California, it must maintain protections for the fisheries and those who work in them. 2 ER at 88. The statute clearly forbade the result that the Service defends here—a healthy otter population remains on San Nicolas Island but none of the management zone's protections apply.[10] Because the statute unambiguously forbids this result, the court's analysis should end there. *See Chevron*, 467 U.S. at 844.

B. Statutory Context Reinforces Public Law No. 99-625's Unambiguous Text

If Public Law No. 99-625 were not already clear enough, its relationship with subsequently enacted legislation clinches the point. As the Supreme Court has explained, courts must interpret statutes with an eye toward subsequently enacted legislation to ensure that the statutes make sense in combination. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 143.[11]

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[10] The Fishermen's interpretation of Public Law 99-625 is hardly unique or controversial. The Navy also opposed the 2012 regulation on the grounds that it violated the statute. *See* 2 ER 70-71.

[11] Congress has repeatedly refused to repeal Public Law No. 99-625 since the Service adopted its final rule depriving it of legal effect. (continued…)

Congress has acted in express reliance on the continued applicability of Public Law No. 99-625's management zone's protections. In 1994, it amended the Marine Mammal Protection Act to relax restrictions on incidental take during commercial fishing operations. *See* 16 U.S.C. § 1387. However, Congress excluded sea otters from this reform because it intended for Public Law No. 99-625 to continue to govern incidental take of that species. *See id.* § 1387(a)(4); *see also* H. Rep. No. 103-439 (Mar. 21, 1994) ("Taking of California [southern] sea otters is regulated under Public Law 99-625.").

Termination of the management zone's protections, after Congress expressly relied upon them in amending the Marine Mammal Protection Act, would thwart congressional intent. Fishermen would be subject to uniquely inflexible regulatory restrictions, since they

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(…continued) *See* H.R. 1735, 114th Cong. § 313(c) (2015-2016); S. 1376, 114th Cong. § 313(c) (2015-2016); S. 1118, 114th Cong. § 304(c) (2015-2016); S. 2289, 113th Cong. § 315(c) (2013-2014); S. 2410, 113th Cong. § 353(c) (2013-2014); H.R. 1960, 113th Cong. § 320(c) (2013-2014). This suggests that Congress continues to recognize and support the statute's careful compromise between the interests of the sea otter and those who work and play in the surrounding fishery. Considering Congress' actions, the statute should not be interpreted to deny it continuing legal effect.

cannot enjoy the benefits of the subsequent amendment of the Marine Mammal Protection Act nor the protections of Public Law No. 99-625, despite every indication that Congress intended the opposite result—that they would continue to enjoy the incidental take exemption. Public Law No. 99-625 must be interpreted consistent with Congress' express reliance on its continued applicability in amending the MMPA and, thus, the management zone's protections are mandatory and must be restored.

C. The Statute Should Be Interpreted To Avoid a Serious Constitutional Question

If the plain text of the statute and its relationship to the subsequent amendments of the Marine Mammal Protection Act did not eliminate any question of ambiguity, the doctrine of constitutional avoidance would. Under this doctrine, an interpretation of a statute that raises constitutional concerns must be rejected if there is a plausible interpretation that could avoid them. *See Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013). The nondelegation doctrine forbids Congress from delegating power to the Executive Branch, including administrative agencies, without providing an "intelligible principle" to guide the exercise of that power. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). At a minimum, this means that statutes cannot be read to give an agency power

without any guidance as to how it should be wielded. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 414-16 (1935).

If Public Law No. 99-625 were interpreted to authorize the Service to terminate the management zone's protections, it would raise significant constitutional concerns. The statute is devoid of any criteria to guide the Service's decision to terminate these protections. Instead, such authority would be entirely subject to the Service's unconstrained discretion, in violation of the nondelegation doctrine. *See Panama Refining Co.*, 293 U.S. at 414-16 (statute providing *no* guidance for the President's exercise of discretion violates the nondelegation doctrine); *see also Clinton v. City of New York*, 524 U.S. 417, 464-65 (1998) (Scalia, J., concurring) (the nondelegation doctrine applies to executive decisions to terminate or set aside statutory provisions).

The only principles that purportedly constrain the Service's termination authority are of the Service's own invention.[12] *See* 2 ER at 87.

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[12] Under the Service's theory, it is truly free to do whatever it wants, including violate its own regulations. The 1987 regulation required that, if the program were declared a failure, the Service would have to move all of the translocated sea otters back to their parent population. 2 ER at 87. But in declaring the program a failure in 2012, the Service refused to return the otters. 2 ER at 68.

However, an agency cannot cure an unconstitutional delegation by binding its own hands. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001). As the Supreme Court has explained, the agency's exercise of its unconstrained authority to prescribe those limits itself violates the nondelegation doctrine. *See id.* ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise . . . would *itself* be an exercise of forbidden legislative authority.").

This constitutional concern can be avoided by interpreting Public Law No. 99-625 according to its plain terms. Under the statute, the Service has a discretionless obligation to implement the management zone's protections and does not have the unconstrained authority to terminate them.

III

THE STATUTE CANNOT REASONABLY BE INTERPRETED TO AUTHORIZE THE SERVICE TO TERMINATE THE MANAGEMENT ZONE'S PROTECTIONS

Even if Public Law No. 99-625 were ambiguous, the Service's interpretation would not be entitled to deference because it is unreasonable and impermissible. *See Chevron*, 467 U.S. at 842-45. The Service's

interpretation is unreasonable because it so starkly conflicts with the statute's fundamental purpose. *See id.* at 845. The text, structure, and legislative history of the statute make clear that Congress enacted the statute as a compromise to allow the Service to establish a new otter population while minimizing impacts on the individuals who work in the management zone. This is why the statute both authorizes the Service to create the program ("may develop and implement") but mandates, as a condition of creating the program, the establishment of a management zone where protections apply ("The plan . . . shall include . . . .") that must be implemented ("shall implement"). *See* 2 ER at 88-90.

If—but only if—a statute is ambiguous, courts will defer to an agency's interpretation of a statute it was entrusted to administer, if that interpretation is reasonable. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439-42 (2014). An agency interpretation that is inconsistent with a statute's structure or purpose is not reasonable and undeserving of deference. *See id.* at 2442 ("[A] reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

A. The Service's Interpretation of the Statute's Text Is Unreasonable

The Service interprets the plain language of the statute to give it unconstrained authority to terminate the management zone's protections for any reason or no reason at all. This interpretation cannot be squared with the text of the statute. As explained above, the statute repeatedly refers to the management zone's protections using mandatory language. *See* 2 ER at 88-89. The Service's interpretation of the statute impermissibly reads all the mandatory language out of the statute and is therefore unreasonable. *See Lopez v. Davis*, 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").

The Service has maintained, and the lower court accepted, that the Service's discretion to implement the translocation program implicitly included the discretion to terminate it and eliminate the management zone protections. *See* 2 ER at 14-15. Relying on this logic, the Service discounts the significance of the statute's abundant mandatory language by arguing that the management zone would not exist if it had never

developed the translocation program in the first place. The possibility that the plan might have never commenced provides no justification for what the Service has done—establish a healthy and growing sea otter population in Southern California while disclaiming any intention to implement the statute's mandatory protections. *See* 2 ER at 68; 2 ER at 87. The statute unambiguously forecloses this scenario.[13]

The Service's interpretation of the statute is based on an alleged rule that, any time a statute grants an agency discretion to initiate a program, it must also implicitly grant discretion to terminate it and any obligations imposed on the agency because of it. The Service has relied on a single D.C. Circuit decision and decisions from several district courts to reach this conclusion. *See Commonwealth of Pa. v. Lynn*, 501 F.2d 848, 855-56

[13] The Service's erroneous interpretation is further belied by the very reason it was necessary for Congress to enact Public Law 99-625 in the first place—because the MMPA forbid the Service from translocating sea otters. 2 ER at 59. The statute was therefore drafted to expressly permit the Service to move otters into Southern California's waters, and nothing more. *See* 2 ER at 88-90. If Congress intended to further authorize the Service to declare the program a failure and return the otters to the parent population, it would have had to say so expressly. Otherwise, the MMPA would forbid the Service from translocating the otters back to their existing range. 2 ER at 59. Since Congress did not expressly authorize termination and the otters' return, the Service lacks that authority.

(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*, 886 F. Supp. 45 (D.D.C. 1995).[14]

None of these cases supports the Service's broad rule. None interpreted the 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* 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.

The cases noted above are not binding on this Court. Thus, even if they did 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

[14] The lower court accepted the Service's theory, citing to the same cases. *See* 1 ER 14.

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. The Service's theory would ignore important context, even though it is unlikely that Congress would give an agency unconstrained power to unilaterally terminate a program on which regulated parties depend for their livelihoods.

That is exactly 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 or recreate in Southern California's waters, only enjoy their benefit of the compromise if, having established the population, the Service maintains the protections. Otherwise, they face precisely the result the statute was intended to avoid—a sea otter population in Southern California with no protections for the surrounding fisheries. In fact, the Service terminated the management zone solely based on the population's size three years after it was established. Under the Service's theory, it could have (even should have) created the population and almost immediately terminated the management zone's protections–denying the Fishermen any benefit from the bargain.

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 the authorized development. Although 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), and then later refuse to comply with the conditions. *See, e.g.*, *Cty. of Imperial v. McDougal*, 19 Cal. 3d 505 (1977) at 510-11. This is true even if the permittee later decides, after accepting the bargain, that the project was less profitable than she originally had hoped. For the same reasons, the clear language of the statute should not be interpreted to allow the Service to establish a sea otter population on San Nicolas Island and then later refuse to comply with the conditions that Congress explicitly placed on the Service's authority.

B. The Service's Interpretation Is Unreasonable Considering the Statute's Purpose and History

The statute leaves no doubt about Congress' purpose in structuring the statute the way that it did. It expressly states that "[t]he purpose of the management zone is to (i) facilitate the management of sea otters . . . and (ii) to prevent, to the maximum extent feasible, conflict with other

fishery resources." 2 ER at 89. Although Congress left many things to the Service's discretion—whether to accept the compromise, where to establish the new otter population, how many otters to move and when—Congress' purpose was to strike a balance between promoting otter recovery and reducing adverse impacts to the Fishermen themselves.

The Service's interpretation is unreasonable considering this clear purpose, because it purportedly gives the Service unconstrained authority to disclaim the management zone's protections at any time and for any reason. According to that interpretation, the Service was free to immediately terminate the management zone's protections right after establishing the new otter population,[15] regardless of the severe conflicts with other fishery resources that would have resulted.

The legislative history of the statute also reveals the unreasonableness of the Service's interpretation. It acknowledges that "[p]eople have been talking for years about the translocation of California sea otters" but "[l]ittle progress has been made . . . because of intense

[15] In fact, in the Service's view, since the termination decision was based on the population's status three years into the program, that's precisely what should have happened. Under this self-serving interpretation, the Service could enjoy its entire benefit of the bargain while denying the Fishermen any of theirs.

conflicts among the various interests and government agencies." 2 ER at 91. The statute resolved these conflicts because "[m]ost of the interests concerned were involved in drafting" it, causing it to "represent[] a consensus approach" that sought to protect both the otter and the surrounding fishery. *Id.* Senator Cranston offered perhaps the clearest articulation of the view that the statute was a balanced compromise, "urg[ing the] adoption" of the statute "[i]n the interest of protecting the California sea otter *and* making progress toward balancing the utilization of the resources of the California coast[.]" 2 ER at 92 (emphasis added); *see also* 2 ER at 91. This legislative history strongly supports the interpretation of the statute's management zone's protections as mandatory. If these protections are not mandatory, the statute does not represent a consensus approach or cement a compromise that advances both sea otter recovery and protection for the surrounding fishery. Instead, it would give one side of that compromise the unconstrained power to disregard the interests of the other side of the compromise.

Nothing in the legislative history supports the Service's interpretation. The Service has repeatedly focused on one statement made by a single congressmen in support of a different bill, which was never enacted. 2 ER at 95. Speaking in support of the earlier, unenacted bill, Representative Breaux suggested that the Service should specify factors to determine whether an otter translocation had been successful and, if not, terminate the program by returning otters to the parent population.[16] 2 ER at 95. However, the Service's reliance on this isolated statement, made outside the adoption of Public Law No. 99-625, is unavailing.

First, a lone congressman's statement cannot supplant the clear statutory text or create ambiguity where there is none. *See Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995). Second, a remark of a single legislator is not controlling or entitled to much weight. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). Third, Representative Breaux's

[16] Of course, the rule terminating the management zone's protections conflicts with this statement, as well as the regulation under which it was purportedly adopted, since the otters on San Nicolas Island were not returned to the parent population. *See* 2 ER at 68; 2 ER at 87.

statement provides no analysis of how Public Law No. 99-625 authorizes the Service to take this step or defines criteria to guide its decision. *See* 2 ER at 95. Fourth, there is no evidence that the legislators who passed Public Law No. 99-625 were even aware of the statement's existence. Congressman Breaux did not repeat this statement when Congress was considering the bill that became Public Law No. 99-625. Legislative history can only be helpful to the extent that it provides a clear indication of Congress' intent at the time that it enacted a law. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 580 (1995); *see also GTE Sylvania*, 447 U.S. at 118-19; *Nw. Forest Resource Council v. Glickman*, 82 F.3d 825, 835-36 (9th Cir. 1996).

The decision of the Ninth Circuit in *In re Catapult Entertainment, Inc.* is illustrative. There, the Ninth Circuit refused to consider a committee report on an earlier, failed bill as compelling legislative history for a later, enacted one because "the report relates to a different proposed bill, predates enactment [of the bill that passed] by several years, and expresses at most the thoughts of only one committee in the House[.]" 165 F.3d 747, 753-54 (9th Cir. 1999). For the same reasons, Representative Breaux's isolated statement regarding a different

proposed bill, a statement not repeated during the deliberation of Public Law No. 99-625, is not compelling legislative history and cannot undermine the statute's text.

Considering Congress' purpose of balancing sea otter recovery and reducing impacts on individuals, the Service's interpretation of the statute is unreasonable. Since the statute provides no criteria for terminating the protections that the statute mandates, the Service's interpretation would mean that it could have terminated the management zone's protections for any reason or no reason whatsoever. Obviously, this would not further Congress' goal of providing assurances that the balance it struck would hold. To the contrary, it would undermine it. Therefore, even if the statute were ambiguous, the Service's interpretation would not be entitled to deference. *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2439.

CONCLUSION

The Service's termination of the management zone's protections exceeds its authority under Public Law No. 99-625. The statute is clear that the Service's obligations under the compromise, including the implementation of the management zone's protections, are mandatory. When Congress provided that the Service "shall" implement the management zone's protections, it meant it. The Service's violation of this command is unlawful and the lower court's ruling should be reversed.

DATED: June 16, 2017.

Respectfully submitted,

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STATEMENT OF RELATED CASE

Also pending before this Court is *California Sea Urchin Commission v. Michael Bean*, No. 15-56672 (briefing completed on July 20, 2016). In that case, some of the plaintiffs in this case challenged the Service's denial of their petition seeking reinstatement of the management zone. That case was dismissed by the district court for lack of standing, and the arguments were rejected on the merits. Oral arguments in that case will be consolidated with oral arguments in this case.

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