No. _____

In The
Supreme Court of the United States

CALIFORNIA SEA URCHIN COMMISSION, et al.,
Petitioners,

v.

SUSAN COMBS, et al.,
Respondents.

CALIFORNIA SEA URCHIN COMMISSION, et al.,
Petitioners,

v.

SUSAN COMBS, et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

Twenty-five years after accepting this authority and reintroducing sea otters into these waters, the Service repealed the regulation and terminated the statute's protections.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

The questions presented are:

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

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

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

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

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

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

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

STATUTORY PROVISION AT ISSUE

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

> SECTION 1. . . .
>
> . . . .
>
> (b) PLAN SPECIFICATIONS. — The Secretary may develop and implement, in accordance with this section, a plan for the relocation and management of a population of

California sea otters from the existing range of the parent population to another location. The plan, which must be developed by regulation and administered by the Service in cooperation with the appropriate State agency, shall include the following:

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

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

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

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

(A) surrounds the translocation zone; and

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

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

> otters and the containment of the experimental population within the translocation zone, and (ii) to prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone by the experimental population. Any sea otter found within the management zone shall be treated as a member of the experimental population. The Service shall use all feasible non-lethal means and measures to capture any sea otter found within the management zone and return it to either the translocation zone or to the range of the parent population.
>
> (5) Measures, including an adequate funding mechanism, to isolate and contain the experimental population.
>
> (6) A description of the relationship of the implementation of the plan to the status of the species under the Act and to determinations of the Secretary under section 7 of the Act. "16 USC 1536"

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

. . . .

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

> Section 9 of the Act "16 USC 1538" applies to members of the experimental population; except that any incidental taking of such a member during the course of an otherwise lawful activity within the management zone, may not be treated as a violation of the Act or the Marine Mammal Protection Act of 1972. "16 USC 1361 note"

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

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

. . . .

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

Statutory and Regulatory Background

Public Law No. 99-625

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

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

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

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

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

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

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

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

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

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

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

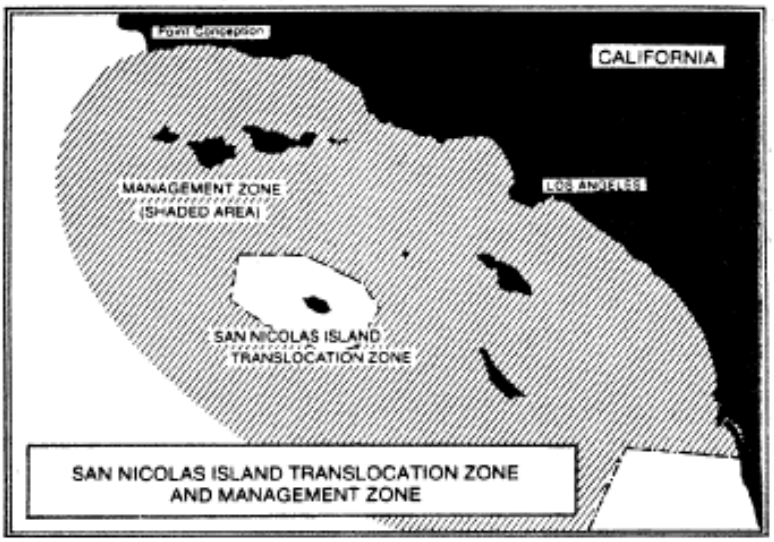
The statute delegates a few, discrete decisions to the agency, including "[t]he number, age, and sex of sea otters proposed to be relocated[;]" "[t]he manner in which the sea otters will be captured, translocated, released, monitored, and protected[;]" and setting the boundaries of the management zone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

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

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

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

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



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

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

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

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

The San Nicolas Island otter population

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

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

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

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

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

The Service terminates the statute's protections

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

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

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

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

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

Impacts to the Fishermen

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

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

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

Proceedings Below

District Court decisions

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

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

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

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

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

Ninth Circuit's decision in the consolidated cases

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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