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UNITED STATES DISTRICT COURT

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FOR THE EASTERN DISTRICT OF CALIFORNIA

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11 JOSEPH ABAD; AUSTEN BROWN,

12 Plaintiffs,

13 v.

14 CHARLTON BONHAM, in his official capacity
as Director of the California Department of Fish
15 and Wildlife; XAVIER BECERRA, in his official
16 capacity as Attorney General of the State of
California,

17 Defendants.

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No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 **JURISDICTION**

2 1. The Court has subject matter jurisdiction over this action pursuant to: 42 U.S.C.
3 § 1983 (deprivation of federal rights); 28 U.S.C. §§ 1331 (authorizing federal question jurisdiction
4 in the district courts), 1343 (civil rights), and 2201-2202 (Declaratory Judgment Act); the
5 Supremacy Clause of the United States Constitution, art. VI, cl. 2; and *Ex parte Young*, 209 U.S.
6 123 (1908) (authorizing suits against state actors in their official capacities for equitable relief to
7 restrain violations of the Constitution).

8 **INTRODUCTION**

9 2. Fishing is an ancient and honorable tradition. Plaintiffs Joseph Abad and Austen
10 Brown are fishermen who have collectively plied their trade in the waters of the Pacific Ocean for
11 more than 50 years.

12 3. Mr. Abad has fished commercially for over 30 years. He has participated in
13 California fisheries for salmon, crab, albacore, swordfish, squid, and black cod.

14 4. Currently, Mr. Abad participates in the drift gill net swordfish fishery through
15 permits, vessel, and nets owned by his employer. Mr. Abad’s employer has agreed to transfer his
16 federal drift gill net permit to Mr. Abad, so as to allow Mr. Abad to independently participate in
17 the West Coast commercial swordfish fishery using drift gill nets, and in turn to make unnecessary
18 the employer’s presence on board when the drift gill nets are used. However, Mr. Abad and his
19 employer have not completed the transfer due to the law challenged in this case.

20 5. Swordfish are an important part of the professional and personal life of Mr. Brown.
21 Mr. Brown has fished commercially since he was a child, gradually honing his craft and gaining
22 experience as a crewmember and deckhand on boats up and down the West Coast. After getting his
23 start fishing for swordfish, Mr. Brown ran a boat in Alaska for nearly a decade fishing for seasonal
24 species, primarily pollock and salmon. Of late, Mr. Brown has run a longline boat in Hawaii for
25 tuna. Mr. Brown is also a fish broker, having sold drift gill net-caught swordfish to markets across
26 the United States.

27 6. Mr. Brown would now like to return to his roots and diversify his business by
28 participating in the West Coast commercial swordfish fishery using drift gill nets—the only proven

1 commercially viable gear for the fishery. To that end, he has obtained a federal permit, has access
2 to the requisite gear and properly permitted vessel, and is fully prepared and can readily obtain a
3 California commercial fishing license. (A true and correct copy of Mr. Brown's federal permit is
4 attached to the Complaint as Exhibit 1).

5 7. The West Coast swordfish industry is an important component of the nation's
6 domestic fishing industry, as evidenced by the National Marine Fisheries Service's decision to
7 federalize the fishery in 2018 through a permitting system administered by that agency.

8 8. But shortly after that decision, the California legislature enacted Senate Bill 1017,
9 which amended the state's Fish and Game Code to terminate California's decades-old permitting
10 program for the commercial catch and landing of swordfish by drift gill net. As a result of S.B.
11 1017's amendments, fishermen like Mr. Abad and Mr. Brown are prohibited from obtaining state
12 permits from existing permittees and therefore are prohibited from taking or landing swordfish for
13 commercial purposes by drift gill net. And once fully implemented, S.B. 1017 will eliminate all
14 outstanding state permits and result in the Fish and Game Code's categorical prohibition on the
15 taking or landing for commercial purposes of swordfish caught by drift gill net. The state program
16 established by S.B. 1017 is therefore aimed at eliminating the swordfish drift gill net fishery in
17 California, thus preventing Mr. Abad, Mr. Brown, and other similarly situated fishermen from
18 accessing seaports for the purpose of exercising the right to earn a living by fishing for swordfish.

19 9. Because it attacks what federal law expressly permits, and because it precludes the
20 commercially viable use of a federally regulated fishery, California's anti-fisherman campaign
21 unlawfully deprives Mr. Abad and Mr. Brown of their federal rights, including their Fourteenth
22 Amendment right to earn a living secured by the Privileges or Immunities Clause, or is otherwise
23 preempted by federal law. Mr. Abad and Mr. Brown therefore bring this action to obtain declaratory
24 and injunctive relief to vindicate their federal rights and to safeguard their trade and business.

25 VENUE

26 10. Venue in the Eastern District of California is proper because Defendants reside in
27 this District, in that they maintain their principal offices in which they discharge their official duties
28 in this District. *See* 28 U.S.C. § 1391(b)(1).

1 11. Venue in the Sacramento sitting of the Court is proper because this action arises in
2 Sacramento County, wherein Defendants maintain their principal offices in which they discharge
3 their official duties. *See* L.R. 120(d).

4 **THE PARTIES**

5 *Plaintiffs*

6 12. Plaintiff Joseph Abad is a California native, United States citizen, and an active
7 commercial swordfish fisherman. Although he resides in Oregon, he has been a licensed
8 commercial fisherman in California for over 30 years. Mr. Abad wishes to continue fishing in the
9 swordfish drift gill net fishery, but as an independent permit-holder. He currently participates in
10 the drift gill net swordfish fishery through a permit held by his employer, but Mr. Abad's employer
11 wishes to transfer his federal drift gill net permit to Mr. Abad once that permit becomes eligible for
12 transfer. However, absent a declaration that S.B. 1017 is illegal, Mr. Abad and his employer are
13 unwilling to complete the transaction. As a result, Mr. Abad is currently barred from making a
14 living as an independent commercial fisherman of swordfish.

15 13. Plaintiff Austen Brown is a California resident, United States citizen, and an active
16 commercial fisherman. Mr. Brown wishes to enter the swordfish drift gill net fishery. To that end,
17 Mr. Brown has acquired a general state swordfish permit, as well as a federal drift gill net permit.
18 However, he must also obtain a state drift gill net permit under California law. But California law
19 does not authorize the issuance of state drift gill net permits to new permittees, and it prohibits the
20 transfer of existing state permits. Mr. Brown is unwilling to fish under his federal permit on account
21 of his reasonable fear that the California Fish and Game Code's penalties for unpermitted taking
22 and landing of swordfish for commercial purposes by drift gill net will be enforced against him
23 should he choose to do so. As a result, Mr. Brown is currently barred from making a living as a
24 commercial fisherman of swordfish.

25 *Defendants*

26 14. Defendant Charlton Bonham is the Director of the California Department of Fish
27 and Wildlife. He is the highest ranking Department official, and as such is ultimately responsible
28 for the Department's enforcement of the California Fish and Game Code, including those portions

1 the application of which is challenged in this action. Director Bonham is sued in his official capacity
2 only, pursuant to *Ex parte Young*, for depriving Mr. Abad and Mr. Brown of their federal rights
3 under color of state law.

4 15. Defendant Xavier Becerra is the Attorney General of the State of California. He has
5 chief responsibility for the judicial enforcement of the state’s laws, including those portions of the
6 California Fish and Game Code the application of which is challenged in this action. Attorney
7 General Becerra is sued in his official capacity only, pursuant to *Ex parte Young*, for depriving
8 Mr. Abad and Mr. Brown of their federal rights under color of state law.

9 LEGAL FRAMEWORK

10 *Preemption and Privileges or Immunities*

11 16. The Supremacy Clause of the United States Constitution provides that the
12 Constitution, treaties, and federal statutes “shall be the supreme Law of the Land,” which shall bind
13 “the Judges in every State . . . , any Thing in the Constitution or Laws of any State to the Contrary
14 notwithstanding.” U.S. Const. art. VI, cl. 2.

15 17. A law that violates the Supremacy Clause is preempted thereby and without force
16 or effect.

17 18. A state law can be preempted in three different ways. First, Congress may expressly
18 override a state law. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993). Second,
19 Congress may impliedly override a state law by occupying an entire field of regulation. *Oneok, Inc.*
20 *v. Learjet, Inc.*, 575 U.S. 373, 376-78 (2015). Third, Congress may impliedly override a state law
21 whenever the latter conflicts with federal law, either because it is impossible to comply with both,
22 *Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 480 (2013), or because the state law imposes an
23 intolerable burden on the achievement of federal policy, *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*,
24 505 U.S. 88, 98 (1992).

25 19. The Privileges or Immunities Clause of the Fourteenth Amendment to the United
26 States Constitution provides that “[n]o State shall make or enforce any law which shall abridge the
27 privileges or immunities of citizens of the United States.” U.S. Const. amend. XIV, § 1.

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1 30. A “valid drift gill net . . . swordfish permit” is a permit issued by the California
2 Department of Fish and Wildlife. *See* Cal. Code Regs. tit. 14, § 106(a)(2) (“The department shall
3 issue permits . . .”).

4 31. A violation of the drift gill net permitting requirement is a misdemeanor, *see* Cal.
5 Fish & Game Code § 12000(a), punishable by a fine of up to \$40,000 and imprisonment in the
6 county jail for up to one year, *id.* § 12012(a), forfeiture of all commercial fishing licenses, *id.*
7 § 12153, and seizure of all fish taken without a permit, *see id.* § 12159.

8 **FACTUAL ALLEGATIONS**

9 *The West Coast swordfish fishery*

10 32. The swordfish (*Xiphias gladius*) is a large migratory fish found throughout the
11 Pacific, Atlantic, and Indian Oceans. Popular since ancient times as food, the swordfish has for
12 decades been the subject of a robust commercial fishery off of the U.S. West Coast.

13 33. Most swordfish caught within the commercial swordfish fishery are caught an
14 average of 40-60 miles off shore.

15 34. The traditional gear for the West Coast commercial swordfish fishery is the harpoon.

16 35. Since the early 1980s, California has operated a permit system for the commercial
17 fishing of swordfish using drift gill nets. *See* Cal. Stats. 1982 ch. 1078, § 3, at 3901 (creating Cal.
18 Fish & Game Code § 8561).

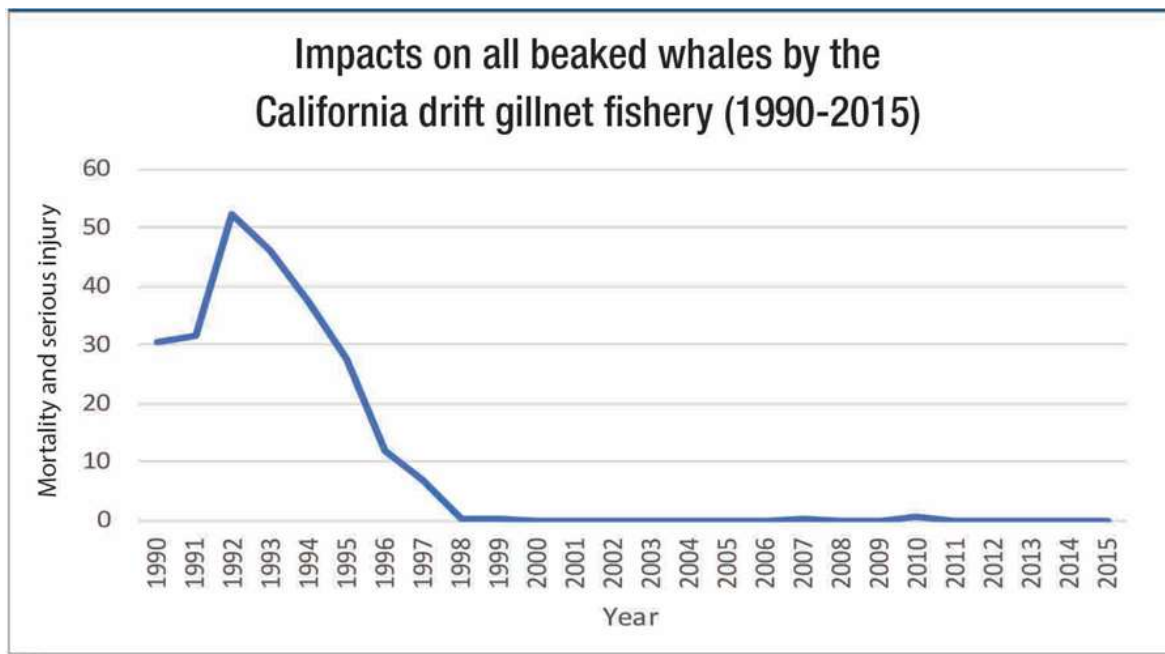
19 36. A drift gill net is a wall of netting that hangs in the water column. Typically made
20 of nylon, the net’s mesh is large enough to allow a fish to insert its head but not its body. The net
21 thus catches the fish by its gills. The net is kept afloat at the proper depth by weights and buoys.
22 *See* NOAA Fisheries, Fishing Gear: Gillnets, at <https://bit.ly/2r478zl> (last visited Feb. 24, 2020).

23 37. California’s drift gill net permitting program is “limited entry” in that the maximum
24 number of permits available is based on the number of eligible fishermen at the program’s
25 inception. *See* Cal. Stats. 1982 ch. 1078, § 3, at 3902 (predicating eligibility on having a shark drift
26 gill net permit or on having landed a certain poundage of swordfish).

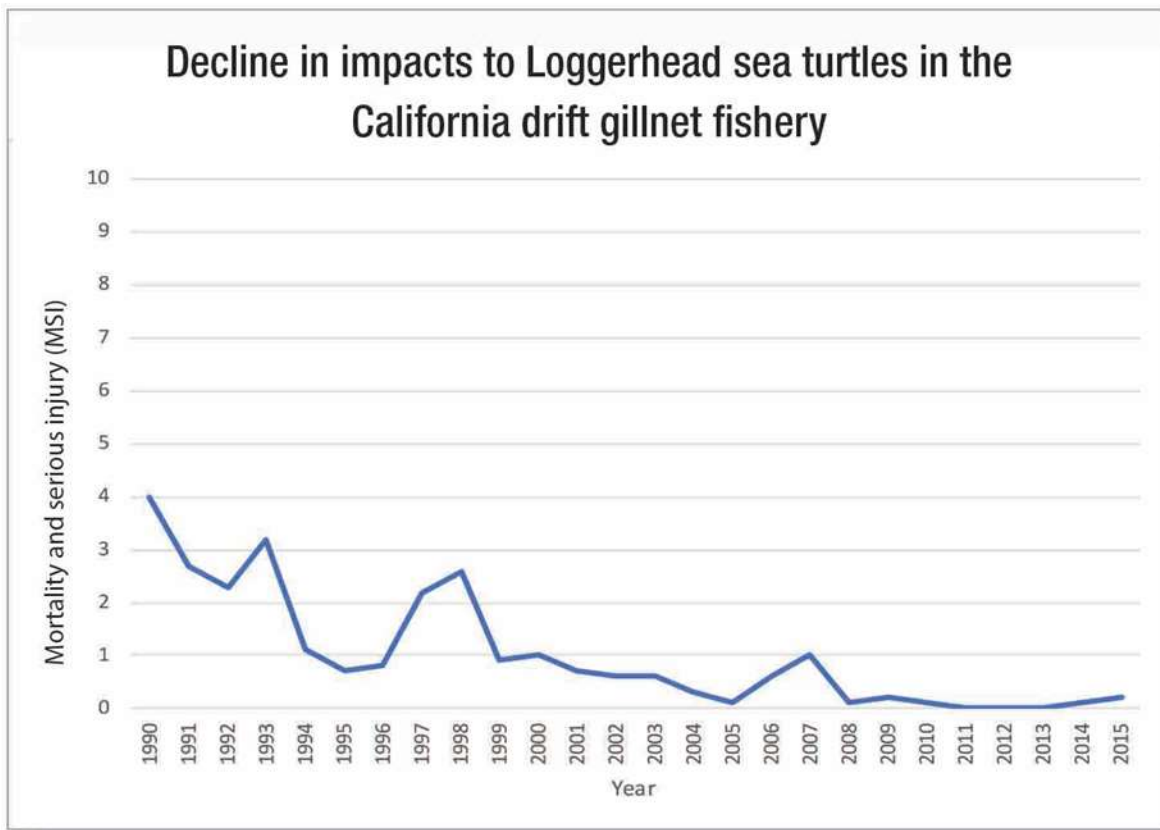
27 38. As with nearly all commercial fishing gear, the use of drift gill nets produces
28 bycatch, *i.e.*, the catch of species other than the intended species. Decades ago the drift gill net

1 fishery in California was considered to have an unacceptably high bycatch rate for marine mammals
2 and other protected species. But subsequently enacted regulation has nearly eliminated unwanted
3 bycatch. For example, the National Marine Fisheries Service has implemented time and area
4 closures to protect leatherback and loggerhead sea turtles. U.S. Dep’t of Commerce, NOAA Nat’l
5 Marine Fisheries Serv., U.S. Nat’l Bycatch Report 36 (2011), at <https://bit.ly/38ZC3kL>. The agency
6 also has required the use of acoustic pingers to discourage interaction with cetaceans, such as
7 whales and dolphins. *Id.*

8 39. These and other mitigation efforts “have dramatically reduced bycatch of protected
9 species such that it is now relatively unusual for many large whales and turtles to become
10 entangled.” NOAA Fisheries West Coast Region, FAQs: West Coast drift gillnet (DGN) fishery &
11 protected species 4 (June 2017) [hereinafter NOAA FAQ], at <https://bit.ly/2KsCdcu>. This
12 remarkable success is well illustrated by the following graphs:



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Source: NOAA Fisheries, West Coast Region, *Two Decades Later, Focused Efforts on Reducing Entanglements in Gillnet Fishery Still Paying Off* (June 2017), at <https://bit.ly/2IeMcQH>.

40. Because of these and other measures, the Service in 2018 re-designated the California drift gill net fishery a “Category II” fishery, 83 Fed. Reg. 5349, 5362 (Feb. 7, 2018), meaning that it only occasionally injures marine mammals. NOAA Fisheries, Marine Mammal Protection Act List of Fisheries, at <https://bit.ly/2PQVOKK> (last visited Feb. 24, 2020). The Service reaffirmed the fishery’s Category II status in 2019, 84 Fed. Reg. 22,051, 22,063 (May 16, 2019), and has proposed to retain that status for 2020, 84 Fed. Reg. 54,543, 54,551 (Oct. 10, 2019).

41. In part because of the impact on profitability caused by these significant mitigation measures, many drift gill net fishermen have exited the fishery. *See* NOAA FAQ at 5 (“[T]he number of vessels participating in the [drift gill net] fishery has dropped by about 90 percent since the 1990s to just 20 vessels [in 2016].”). The remaining fishermen are small operations that rely principally on swordfish to provide a significant portion of their income. *Id.*

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1 42. Opponents of drift gill nets contend that “deep set buoy gear”—a floating buoy
2 supporting a single vertical line with baited hooks—is a more environmentally sensitive yet still
3 economically viable gear. Cal. Stats. 2018 ch. 844, § 1(e), (f) (S.B. 1017).

4 43. There is no evidence that deep set buoy gear is adequate for a viable commercial
5 swordfish fishing operation. *See, e.g.,* Letter from Chugey Sepulveda, *et al.*, to Sen. Diane Feinstein
6 (May 6, 2019) (“[W]hile there is potential for alternative gear to be used in this fishery, currently
7 there is no existing gear that can be substituted for the [drift gill net] gear and still allow fishermen
8 to earn a living.”). (A true and correct copy of the Letter from Chugey Sepulveda, *et al.*, to Sen.
9 Diane Feinstein is attached to this Complaint as Exhibit 2.)

10 44. There is, however, evidence that such gear can be environmentally damaging. For
11 example, in 2018, a loggerhead sea turtle—a species protected under the Endangered Species Act—
12 was caught by deep set buoy gear.

13 *Federalization of the swordfish drift gill net fishery*

14 45. In 2003, the Pacific Fishery Management Council proposed, and in 2004 the
15 National Marine Fisheries Service adopted, a fishery management plan for the swordfish and the
16 West Coast’s other highly migratory species. *See* 69 Fed. Reg. 18,444 (Apr. 7, 2004).

17 46. The plan assumed direct control of most of the previously state-regulated fisheries.
18 It did at that time, however, allow California to continue to administer its permitting program for
19 the drift gill net fishery. *See* 69 Fed. Reg. at 18,450.

20 47. In 2017, the Pacific Council and the Service amended the plan to allow for a
21 federalization of the California drift gill net permitting program. Pac. Fishery Mgmt. Council,
22 *Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species As Amended*
23 *Through Amendment 5* at 1 (Apr. 24, 2018), at <https://bit.ly/2HSyCjP>.

24 48. Soon thereafter, the Service enacted implementing regulations for the permitting
25 program. *See* 83 Fed. Reg. 11,146 (Mar. 14, 2018). The number of permits is limited to the number
26 of fishermen who held a valid state permit at the federal program’s inception. 50 C.F.R.
27 § 660.707(f)(2). Although the federal permitting system “adopts many of the current State of
28 California management measures associated with the [drift gill net] fishery,” 83 Fed. Reg. at

1 11,147, fishermen who initially qualified for the federal program need not maintain an active state
2 permit in order to renew their federal permit, *see* 50 C.F.R. § 660.707(f)(9). The program also
3 authorizes the transfer of federal permits between fishermen. *Id.* § 660.707(f)(8).

4 ***California’s permit buyback and permit revocation scheme***

5 49. Shortly after the creation of the federal permitting program, the California
6 legislature enacted S.B. 1017 (Allen 2018). The law creates a permit buyback program, according
7 to which state permit holders may receive compensation from the state (up to \$110,000) if they
8 surrender their drift gill net fishing equipment and state drift gill net permits to the Department, and
9 agree not to use or transfer their federal drift gill net permits. S.B. 1017, § 7, Cal. Fish & Game
10 Code § 8583.

11 50. In addition to the buyback program, S.B. 1017 establishes a sunset date for all state
12 drift gill net permits that are not surrendered pursuant to the buyback program. Specifically, as of
13 January 31 of the fourth year following the establishment of the buyback program, all outstanding
14 state permits shall be automatically “revoked.” S.B. 1017, § 3(c), Cal. Fish & Game Code § 8561(c).

15 51. S.B. 1017 also prohibits, as of March 31, 2019, the transfer of state drift gill net
16 permits. S.B. 1017, § 5, Cal. Fish & Game Code § 8561.5(a).

17 52. In September, 2019, the Department promulgated regulations to govern the buyback
18 program’s operation. *See* Cal. Code Regs. tit. 14, § 106.5. The Department expects the buyback
19 program to begin offering compensation “within a couple months of the completion” of the
20 program’s rulemaking. Final Statement of Reasons for Regulatory Action, Appendix C, Responses
21 to Public Comment on Drift Gill Net Transition Program 1 (Aug. 30, 2019), *at*
22 <https://bit.ly/2pVVAkK>.

23 **DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS**

24 53. An actual and substantial controversy exists between Plaintiffs and Defendants.
25 Mr. Abad and Mr. Brown contend that they have the right to conduct their trade pursuant to federal
26 drift gill net permits, notwithstanding S.B. 1017’s elimination of the state drift gill net program,
27 including state permit transferability. Defendant Director Bonham and the California Department
28 of Fish and Wildlife have been notified repeatedly of the position of many participants within the

1 California swordfish fishery that the state prohibition on the catch and landing of swordfish for
2 commercial purposes using drift gill nets violates federal law. Letter of Ashley J. Remillard to the
3 Honorable Edmund G. Brown, Jr., *et al.* (Aug. 30, 2018); Letter of Damien M. Schiff to Director
4 Charlton H. Bonham (Jan. 17, 2019); Letter of Damien M. Schiff to Ona Alminas, Cal. Dep’t of
5 Fish & Wildlife (May 17, 2019); Letter of Damien M. Schiff to Ona Alminas, Cal. Dep’t of Fish
6 & Wildlife (June 17, 2019). (True and correct copies of these letters are attached to the Complaint
7 as Exhibits 3, 4, 5, and 6, respectively.)

8 54. Neither Defendants nor any other official of the Department or of the Attorney
9 General’s Office on behalf of the Department has provided any substantive response to these
10 statements from concerned fishermen. *Cf.* Final Statement of Reasons for Regulatory Action,
11 Appendix B, Responses to Public Comment on Drift Gill Net Transition Program 3 (Aug. 30,
12 2019), at <https://bit.ly/2pVVAKK> (stating that the preemption question raised by comment letters
13 “is outside the scope of this rulemaking”); *id.* Appendix C, Responses to Public Comment on Drift
14 Gill Net Transition Program 1 (Aug. 30, 2019) (same).

15 55. This failure to respond is reasonably interpreted as a disagreement with the position
16 of fishermen like Mr. Abad and Mr. Brown that S.B. 1017 is preempted or is otherwise
17 unenforceable to the extent that it prohibits the commercial taking or landing of swordfish by drift
18 gill net pursuant to a valid federal permit. Therefore, declaratory relief is proper to resolve whether
19 the California Fish and Game Code’s prohibition as applied to fishermen possessing federal drift
20 gill net permits who cannot obtain state drift gill net permits, either because of S.B. 1017’s transfer
21 restriction, or because of S.B. 1017’s revocation of state permits (once effective), violates the
22 Constitution’s Supremacy Clause and the Fourteenth Amendment’s Privileges or Immunities
23 Clause.

24 56. Without declaratory relief, and if an injunction does not issue precluding Defendants
25 from applying S.B. 1017’s prohibition to fishermen possessing federal drift gill net permits but who
26 cannot obtain state drift gill net permits because of S.B. 1017’s state permit transfer restriction,
27 Mr. Abad and Mr. Brown will be irreparably injured. A substantial part of Mr. Brown’s and
28 Mr. Abad’s income is expected to come from participation in the drift gill net fishery.

1 57. In the absence of relief from this Court, Mr. Abad is not willing to acquire his
2 employer’s federal drift gill net permit, nor is he willing to fish without a valid state drift gill net
3 permit, for fear of prosecution by Defendants for violation of the California Fish and Game Code’s
4 state drift gill net permitting requirement, Cal. Fish & Game Code § 8561(a), and resulting seizure
5 of all caught swordfish, *id.* § 12159, and other penalties. *See id.* §§ 12012(a), 12153.

6 58. Likewise, without relief from this Court, Mr. Brown is not willing to fish without a
7 valid state drift gill net permit, for fear of prosecution by Defendants for violation of the California
8 Fish and Game Code’s state drift gill net permitting requirement, *id.* § 8561(a), and resulting seizure
9 of all caught swordfish, *id.* § 12159, and other penalties. *See id.* §§ 12012(a), 12153.

10 59. Mr. Abad and Mr. Brown have no plain, speedy, and adequate remedy at law for
11 these injuries. Money damages in this case are not available.

12 **CLAIMS FOR RELIEF**

13 **Count I:**

14 **(Deprivation of Federal Rights, 42 U.S.C. § 1983)**

15 60. All preceding paragraphs are incorporated herein by reference.

16 61. California law prohibits the taking and landing of swordfish caught by drift gill net
17 for commercial purposes except pursuant to a valid state drift gill net swordfish permit. *See* Cal.
18 Fish & Game Code §§ 8561(a), 12159.

19 62. California law does not authorize the issuance of drift gill net permits to new
20 permittees. *See id.* § 8568(b) (authorizing issuance of permit only “to any prior permittee . . . during
21 the preceding season”). Nor does California law authorize the transfer of existing state permits. *Id.*
22 § 8561.5(a).

23 63. The taking of swordfish caught by drift gill net for commercial purposes is expressly
24 authorized by federal law. 50 C.F.R. § 660.707(f).

25 64. The landing of swordfish caught by drift gill net for commercial purposes is
26 impliedly guaranteed by federal law. *See City of Charleston, S.C. v. A Fisherman’s Best, Inc.*, 310
27 F.3d 155, 173, 176 (4th Cir. 2002) (“But where there is [a federal management plan] in effect and

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1 the cargo consists of fish that have been caught in federal waters the fisherman is entitled to access
2 to landing facilities to land his catch.”).

3 65. For the West Coast swordfish fishery, no gear besides the drift gill net is both lawful
4 and adequate for a viable commercial swordfish fishing operation.

- 5 • The only gear besides drift gill net that is currently lawful and generally
6 available is the harpoon and single hook-and-line. *See* Cal. Code Regs.
7 tit. 14, § 107(e)(1). The yield of swordfish from harpoon and single hook-
8 and-line is not adequate for a viable commercial swordfish fishing operation.
- 9 • Experimental permits have been made available to use deep set buoy gear to
10 target swordfish. But neither Mr. Abad nor Mr. Brown possesses such a
11 permit, no general permit for that gear’s use currently exists, and no general
12 permit is likely to be developed within the foreseeable future. Moreover, the
13 yield of swordfish from deep set buoy gear is not adequate for a viable
14 commercial swordfish fishing operation.

15 66. The California Fish and Game Code’s prohibition on the taking or landing for
16 commercial purposes of swordfish caught by drift gill net imposes an intolerable burden on the
17 pursuance of federal fishery management policy by (i) directly attacking conduct that is
18 affirmatively protected by federal law, and (ii) substantially undercutting the commercial viability
19 of a federally regulated fishery. *Cf. Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1145
20 (9th Cir. 2015) (fishery preemption question resolved by whether federal law “affirmatively
21 guarantees” what state law prohibits, and whether state law prohibits “commercially viable uses”
22 for the fishery).

23 67. Therefore, Defendants’ enforcement of the California Fish and Game Code’s
24 prohibition on the taking or landing for commercial purposes of swordfish caught by drift gill net
25 is, as applied to Mr. Abad and Mr. Brown, a deprivation of their federal rights secured by the
26 Magnuson Fisheries Act and its implementing regulations, including 50 C.F.R. § 660.707(f).

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1 **Count II:**

2 **(Preemption; claim for relief in the alternative)**

3 68. All preceding paragraphs are incorporated herein by reference.

4 69. Acting as courts of equity, federal courts have the power to review and enjoin
5 unconstitutional action by state officers. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320,
6 326-27 (2015).

7 70. No provision of federal law precludes the private enforcement of the preemptive
8 effect of the Magnuson Fisheries Act or its implementing regulations.

9 71. For the reasons stated in Count I of the Claims for Relief, Defendants' enforcement
10 of the California Fish and Game Code's prohibition on the taking or landing for commercial
11 purposes of swordfish caught by drift gill net is, as applied to Mr. Abad and Mr. Brown, preempted
12 by the Supremacy Clause, U.S. Const. art. VI, cl. 2.

13 **Count III:**

14 **(Federal Privileges or Immunities)**

15 72. Paragraphs 1-59 are incorporated herein by reference.

16 73. The Privileges or Immunities Clause of the Fourteenth Amendment to the United
17 States Constitution provides that “[n]o State shall make or enforce any law which shall abridge the
18 privileges or immunities of citizens of the United States.” U.S. Const. amend. XIV, § 1.

19 74. The “right of free access to [the United States’] seaports, through which all
20 operations of foreign commerce are conducted,” is one of the privileges protected by the Privileges
21 or Immunities Clause. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (quotation
22 omitted); *cf. Courtney v. Goltz*, 736 F.3d 1152, 1160 (9th Cir. 2013) (right to access “navigable
23 waters of the United States” for purpose of operating a public ferry is not protected by Privileges
24 or Immunities Clause because right does not apply in commercial context).

25 75. The right to access seaports is expressly connected to commercial purposes.

26 76. The right to access seaports for commercial purposes is expressly connected to the
27 ability of citizens to exercise their right to earn a living. It guarantees citizens the ability to access

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1 seaports for the purpose of engaging in commerce—for example, landing fish caught in federal
2 fisheries to sell at market pursuant to federal permits.

3 77. Ports used by Mr. Abad and Mr. Brown to land their swordfish and non-swordfish
4 catch are “seaports.” Were Mr. Abad permitted by California to independently land swordfish, he
5 would likewise do so at “seaports” in California. Were Mr. Brown permitted by California to land
6 swordfish, he would do so at “seaports” in California.

7 78. The enforcement of the California Fish and Game Code’s prohibition on the taking
8 or landing for commercial purposes of swordfish caught by drift gill net is, as applied to Mr. Abad
9 and Mr. Brown, an abridgement of their federal right to access seaports.

10 79. Because the right to access seaports is expressly linked to citizens’ right to earn a
11 living, the prohibition on taking or landing swordfish caught for commercial purposes abridges
12 Mr. Abad’s and Mr. Brown’s constitutionally-protected right to earn a living because their ability
13 to pursue their chosen livelihood is harmed by the prohibition.

14 80. Defendants have no compelling, substantial, or legitimate interest in prohibiting
15 Mr. Abad or Mr. Brown from accessing seaports in California for the taking or landing of swordfish
16 caught for commercial purposes with drift gill net subject to a valid federal permit.

17 81. Defendants’ enforcement of the prohibition on Mr. Abad’s independently accessing
18 seaports in California for the taking or landing of swordfish caught for commercial purposes with
19 drift gill net, *see* Cal. Fish & Game Code §§ 8561(a), 12159, even if Mr. Abad possessed a valid
20 federal permit to do the same, is not narrowly tailored to achieve, nor is it rationally related to, any
21 compelling, substantial, or legitimate governmental interest.

22 82. Defendants’ enforcement of the prohibition on Mr. Brown’s accessing seaports in
23 California for the taking or landing of swordfish caught for commercial purposes with drift gill net,
24 *see* Cal. Fish & Game Code §§ 8561(a), 12159, when Mr. Brown possesses a valid federal permit
25 to do the same, is not narrowly tailored to achieve, nor is it rationally related to, any compelling,
26 substantial, or legitimate governmental interest.

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1 83. As applied to Mr. Abad and Mr. Brown, Defendants’ enforcement of Cal. Fish &
2 Game Code §§ 8561(a), 12159 to prohibit Mr. Abad and Mr. Brown from accessing seaports in
3 California for the taking or landing of swordfish caught for commercial purposes with drift gill net
4 is so burdensome, unreasonable, and unnecessary as to violate the Privileges or Immunities Clause
5 of the Fourteenth Amendment to the United States Constitution.

6 84. Because of Defendants’ enforcement of the above-cited prohibitions on
7 Mr. Brown’s and Mr. Abad’s accessing seaports in California for the taking or landing of swordfish
8 caught for commercial purposes with drift gill nets subject to valid federal permits, Mr. Abad and
9 Mr. Brown are irreparably harmed and have no adequate remedy at law to prevent or minimize
10 their harm unless Defendants are enjoined from continuing to enforce the challenged prohibitions.

11 **PRAYER FOR RELIEF**

12 Wherefore, Mr. Abad and Mr. Brown respectfully request the following relief:

13 1. Entry of a declaratory judgment that:

14 a. The California Fish and Game Code’s prohibition on the taking or landing
15 for commercial purposes of swordfish caught by drift gill net, and Defendants’ enforcement
16 thereof, operate, as applied to Mr. Abad who would proceed to obtain a federal drift gill net
17 permit but for S.B. 1017’s prohibitions—and who cannot obtain a state drift gill net
18 permit—to deprive Mr. Abad of his federal rights secured by the Magnuson Fisheries Act
19 and its implementing regulations, and therefore such prohibition and enforcement are
20 unlawful;

21 b. The California Fish and Game Code’s prohibition on the taking or landing
22 for commercial purposes of swordfish caught by drift gill net, and Defendants’ enforcement
23 thereof, operate, as applied to Mr. Brown who holds a federal drift gill net permit but who
24 cannot obtain a state drift gill net permit, to deprive Mr. Brown of his federal rights secured
25 by the Magnuson Fisheries Act and its implementing regulations, and therefore such
26 prohibition and enforcement are unlawful;

27 c. The California Fish and Game Code’s prohibition on the taking or landing
28 for commercial purposes of swordfish caught by drift gill net, and Defendants’ enforcement

1 thereof, are, as applied to Mr. Abad who would proceed to obtain a federal drift gill net
2 permit but for S.B. 1017’s prohibitions—and who cannot obtain a state drift gill net
3 permit—unconstitutional under the Supremacy Clause, U.S. Const. art. VI, cl. 2;

4 d. The California Fish and Game Code’s prohibition on the taking or landing
5 for commercial purposes of swordfish caught by drift gill net, and Defendants’ enforcement
6 thereof, are, as applied to Mr. Brown who holds a federal drift gill net permit but who cannot
7 obtain a state drift gill net permit, unconstitutional under the Supremacy Clause, U.S. Const.
8 art. VI, cl. 2;

9 e. The California Fish and Game Code’s prohibition on Mr. Abad accessing
10 seaports for the taking or landing for commercial purposes of swordfish caught by drift gill
11 net, and Defendants’ enforcement thereof, are, as applied to Mr. Abad who would proceed
12 to obtain a federal drift gill net permit but for S.B. 1017’s prohibitions—and who cannot
13 obtain a state drift gill net permit—unconstitutional under the Privileges or Immunities
14 Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend.
15 XIV, § 1;

16 f. The California Fish and Game Code’s prohibition on Mr. Brown accessing
17 seaports for the taking or landing for commercial purposes of swordfish caught by drift gill
18 net, and Defendants’ enforcement thereof, are, as applied to Mr. Brown who holds a federal
19 drift gill net permit but who cannot obtain a state drift gill net permit, unconstitutional under
20 the Privileges or Immunities Clause of the Fourteenth Amendment to the United States
21 Constitution, U.S. Const. amend. XIV, § 1;

22 2. Entry of a preliminary and permanent injunction against Defendants, their agents,
23 representatives, and employees, from enforcing or giving effect in any way to the California Fish
24 and Game Code’s prohibition on the taking or landing for commercial purposes of swordfish caught
25 by drift gill net, as applied to Mr. Abad who would proceed to obtain a federal drift gill net permit
26 but for S.B. 1017’s prohibitions—and who cannot obtain a state drift gill net permit;

27 3. Entry of a preliminary and permanent injunction against Defendants, their agents,
28 representatives, and employees, from enforcing or giving effect in any way to the California Fish

1 and Game Code’s prohibition on the taking or landing for commercial purposes of swordfish caught
2 by drift gill net, as applied to Mr. Brown who holds a federal drift gill net permit but who cannot
3 obtain a state drift gill net permit;

4 4. Entry of a permanent injunction against Defendants, their agents, representatives,
5 and employees, from enforcing or giving effect in any way to the California Fish and Game Code’s
6 prohibition on accessing seaports for the taking or landing for commercial purposes of swordfish
7 caught by drift gill net, as applied to Mr. Abad who would proceed to obtain a federal drift gill net
8 permit but for S.B. 1017’s prohibitions—and who cannot obtain a state drift gill net permit;

9 5. Entry of a permanent injunction against Defendants, their agents, representatives,
10 and employees, from enforcing or giving effect in any way to the California Fish and Game Code’s
11 prohibition on accessing seaports for the taking or landing for commercial purposes of swordfish
12 caught by drift gill net, as applied to Mr. Brown who holds a federal drift gill net permit but who
13 cannot obtain a state drift gill net permit;

14 6. An award of Mr. Abad’s and Mr. Brown’s reasonable attorney fees, costs, and
15 expenses pursuant to 42 U.S.C. § 1988, 28 U.S.C. § 2412, or any other appropriate authority; and

16 7. An award of any other further relief that the Court deems to be just and proper.

17 DATED: February 27, 2020.

18 Respectfully submitted,

19 DAMIEN M. SCHIFF
20 CALEB R. TROTTER

21 By s/ Damien M. Schiff
22 DAMIEN M. SCHIFF

23 Attorneys for Plaintiffs Joseph Abad
24 and Austen Brown