No. 15-56672

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

and

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

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

When Congress enacted Public Law No. 99-625, 100 Stat. 3500 (1986), it cemented a compromise between the U.S. Fish and Wildlife Service, environmentalists, and fishermen. The statute authorized the Service to establish a population of sea otters in Southern California on the condition that it implement several protections for those who work and play in surrounding waters. The Service violated this compromise when, decades after accepting the authority and triggering the statute's obligations, it unilaterally terminated them. The Service's actions cannot be squared with the text or purpose of the statute.

In their arguments to the contrary, the Service and Intervenors offer an interpretation fundamentally at odds with the statute. If it is correct, the Service could have terminated the statute's mandated protections immediately after establishing the new sea otter population. In fact, under the regulation they defend in this case, that's precisely what the Service was supposed to do. The Service and Intervenors offer no response to this basic problem with their interpretation, choosing instead to ignore it.

Only Congress can decide that the balance struck in the statute should be reconsidered. It hasn't, despite several opportunities to do so.[1] And, therefore, the Service cannot avoid the obligations that Congress imposed on it through the statute. Consequently, Plaintiff's (Fishermen) petition seeking the restoration of Congress' compromise should have been granted.

I

THE FISHERMEN HAVE STANDING TO CHALLENGE THE DENIAL OF THEIR PETITION

The Service asserts that the Fishermen lack standing to challenge the denial of their petition. It argues that they are not sufficiently injured by the Service's termination of the incidental take exemption, despite being the objects of that regulation. And the Service argues that the Fishermen do not have standing based on the impacts to their fishery because, if their requested relief is granted, their injuries will not be completely relieved. If the Service is wrong on *either* score, the fishermen

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[1] *See* Opening Br. at 39 n.20 (listing bills proposing to repeal the statute). The Service downplays the significance of Congress' repeated decisions not to repeal the statute, notwithstanding the fact that the Service's decision has deprived it of any practical effect, because it recently enacted new exemptions from the Endangered Species Act and Marine Mammal Protection Act for military actions in the former management zone. *See* National Defense Authorization Act for Fiscal Year 2016, Public Law No. 114-92, § 312, 129 Stat. 726, 787-89 (2015). However, Congress' decision to restore the incidental take exemption for military activities (thereby partially reversing the Service's decision) hardly indicates Congress' endorsement of the Service's actions. Nothing in that law is inconsistent with the Fishermen's interpretation of Public Law No. 99-625.

have standing. As will be explained below, *both* of the Service's arguments are incorrect.

A. The Fishermen's Standing Is Presumed Because They Are the Objects of the Service's Regulation

The Supreme Court has explained that a plaintiff's burden in proving standing varies considerably based on whether she is the object of the regulation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). If she is, there is "ordinarily little question" that she has standing. *Id.* As this Court has explained, "a plaintiff is *presumed* to have constitutional standing to seek injunctive relief when it is the direct object of regulatory action challenged as unlawful." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 655 (9th Cir. 2011) (emphasis added). This is because the ultimate question, for standing purposes, is whether the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). The objects of regulations necessarily have this personal stake, since their activities are directly subject to the regulation and they face the choice of abandoning their activities, modifying them, or risking punishment. The Service does not deny that the

Fishermen are the direct object of the regulations they challenge in their petition.[2] Consequently, their standing is presumed under *Los Angeles Haven Hospice*. 638 F.3d at 655.

As the Fishermen explained in their opening brief, this Court routinely hears challenges like this one brought by the objects of regulations. Opening Br. at 15 n.4. The Service blithely dismisses this fact because, in those cases, the Court did not directly address standing. However, this isn't surprising since, under this Court's precedent, standing is presumed. *See Los Angeles Haven Hospice*, 638 F.3d at 655.

The Service distinguishes two of those cases because, there, the plaintiffs' costs to comply with the regulation were several million dollars. Fed. Def.'s Br. at 25. However, this is a distinction without a difference. Standing is not limited to parties that suffer large financial injuries. *Cf. Los Angeles Haven Hospice*, 638 F.3d at 656 ("[T]o the extent the Secretary is suggesting that only economic or pecuniary injury . . . would qualify as injury-in-fact in this case, she is mistaken."). It is not the amount of the injury that gives rise to standing, but the fact of the injury itself.

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[2] The Fishermen's affidavits demonstrate that they are the objects of the regulation, because the organizations represent a variety of fishermen who operate in the management zone and were previously exempt from incidental take liability but now risk violating the prohibition by fishing. 2 ER at 27-33. The record further shows that the Fishermen are currently being injured and their injuries are likely to increase in the future, because a significant sea otter population seasonally migrates into the management zone and is expected to grow and expand further into the zone. 2 ER at 65. The termination of the exemption also exposes the Fishermen to lawsuits by environmental groups to enjoin take. *See* 16 U.S.C. § 1540(g).

The Service next suggests that the Fishermen's claims may not be ripe. This Court has held that the mere existence of a statute may not be sufficient to establish that a claim is ripe and that the plaintiff is currently injured. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 1999). *Thomas*, however, is clearly distinguishable. First, this case is ripe because the Service's denial of the Fishermen's petition is a final agency action subject to challenge under the Administrative Procedure Act. 5 U.S.C. § 702. Second, the plaintiffs in *Thomas* merely asserted a vague intent to someday engage in the actions regulated by the statute. 220 F.3d at 1140. The Fishermen, in contrast, fish in the management zone and thus are currently the objects of the regulation. 2 ER at 27-33. Third, in *Thomas*, it appeared that the statute had only been enforced twice in the twenty-five years since it had been enacted. 220 F.3d at 1140-41. Here, however, the Service's recent decision to terminate the plan demonstrates that this is no abstract disagreement. As the Fishermen explained in their opening brief, the only immediate practical effect of this decision was to repeal the incidental take exemption. Opening Br. at 15-16. If the Service's argument was correct, any agency could merely assert that it may not enforce a newly enacted regulation in order to defeat standing.

The ultimate purpose of standing analysis is avoiding "abstract disagreements" in which the plaintiff has no stake in the outcome. *See Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 772-73 (9th Cir. 2006). The Service's denial of the

Fishermen's petition is no abstract disagreement and, as objects of the regulation, the Fishermen are directly affected by the outcome. Thus, they have standing.

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

The Service also argues that the Fishermen do not have standing to defend their interest in the fishery because the case will not necessarily result in the Service removing otters from the management zone. However, contrary to the Service's argument, standing's redressability requirement does not mean that a case must provide a plaintiff complete relief. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). Instead, all that is required is the plaintiff show that her requested relief will result in a "change in legal status" that increases the likelihood that the ultimate relief will be achieved. *See Novak v. United States*, 795 F.3d 1012, 1019-20 (9th Cir. 2015) (quoting *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012)). If the challenged agency action "has a powerful coercive effect" on the cause of the plaintiff's injury, standing is satisfied. *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

The Fishermen satisfy this standard. Their challenge, if successful, will restore the Service's obligation to use any feasible, nonlethal means to remove otters from the management zone. 2 ER at 52-60. This is a change in the legal status of the Service's obligations to enforce the management zone that has a powerful coercive effect on any future efforts to use feasible, nonlethal means to remove sea otters from the

management zone. The challenged action prevents such efforts whereas, if the fishermen's requested relief was granted, the Service would be obliged to comply with the statute.

True, there are no guarantees that the Fishermen's injuries will be completely redressed, either because feasible, nonlethal means may not be developed (despite Congress' expectation that the Service would continuously search for them, 3 ER at 340) or they may not completely prevent predation of the fishery. But, as the Supreme Court has held, such practical concerns do not prevent plaintiffs from challenging government actions that are an absolute bar to relief. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261-62 (1977) (developer can challenge racially discriminatory zoning decision despite no guarantee that the project would ultimately be built, even if the challenge was successful); *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012) (To satisfy redressability, a plaintiff "is not required to solve all roadblocks simultaneously and is entitled to tackle one roadblock at a time." (citation omitted)).

Next, the Service argues that the Fishermen's injury is not redressable because complete relief would depend on future action by the agency. For this argument, it relies on several cases holding that an injury may not be redressable where relief ultimately depends on the "unfettered choices made by independent actors not before the courts." *Novak*, 795 F.3d at 1020 (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605,

615 (1989)). This argument fails however because the Service is not an "independent actor not before the court," but the defendant in this action. And, if its obligation to use feasible, nonlethal means to remove otters from the management zone is restored, its future actions will be bound by that obligation rather than subject to its "unfettered choices."[3]

The D.C. Circuit has characterized the argument that injuries from agency action are not redressable because they depend on subsequent agency decisions as "a breathtaking attack on the legitimacy of virtually all judicial review of agency action." *Akins v. Federal Election Commission*, 101 F.3d 731, 738 (D.C. Cir. 1997) (en banc), *vacated and remanded on other grounds*, *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). Generally, relief against an agency will depend on what the agency does once the case is remanded to it or how it exercises its enforcement discretion going forward. *Id*. If this alone were enough to deny plaintiffs standing, it could render agencies' legal decision-making unreviewable. *See Natural Law Party of U.S. v. Federal Election Commission*, 111 F. Supp. 2d 33, 50 (D.D.C. 2000) (citing *Akins*, 101 F.3d at 738 n.7). Instead, the question is whether granting the requested relief

[3] This also distinguishes *Levine v. Vilsack*, 587 F.3d 986, 992 (9th Cir. 2009). In that case, animal rights groups challenged an agency's interpretive rule under a statute with no enforcement mechanism. *Id*. at 989-90. Consequently, invalidating the rule would have no impact on third parties. *Id*. at 994-95. The only potential coercive effect would be if the agency chose, in its unfettered discretion, to regulate the same activity under a different statute (which was not at issue in the case). *Id*. at 995.

would result in the agency being able to "exercise its discretion in a proper manner [which] *could* lead to agency action that would redress petitioners' injury." *Competitive Enterprise Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 118 (D.C. Cir. 1990) (emphasis added).

A case on point is *Larson v. Valente*, in which a church challenged a state rule requiring registration if more than half a religious organization's proceeds came from non-members. 456 U.S. at 242-43. The state argued that the church's injury was not redressable because, even if the fifty percent rule was struck down, the church could still be required to register for different reasons. *Id.* The Supreme Court rejected this argument, holding that this does not deprive the plaintiff of standing but only restricts the type of relief available (the church could be declared exempt from the fifty percent rule but not necessarily entitled to an exemption from registration generally). *Id.* Where a ruling in the plaintiff's favor would invalidate defendants actions for the reasons given, that is enough. *Id.*; *cf. SEC v. Chenery Corp.*, 318 U.S. 80, 88-89 (1943) (the legality of agency decisions must be determined solely based on the reasons the agency offered for the decision when it was made). If some other rationale could allow the defendant to reach the same result, it must be put to the task of doing so rather than using that possibility to avoid scrutiny for its actions. *Larson*, 456 U.S. at 243.

The same analysis applies here. Ruling in the Fishermen's favor would reimpose the Service's obligations under the statute. If the Service wanted to avoid its obligation to use feasible, nonlethal means to remove otters from the management zone, it would be put to the task (on an ongoing basis) of demonstrating that such means are not available. Thus, the injury to the Fishermen's interest in protecting their fishery is sufficiently redressable to give them standing.

II

THE STATUTE DOES NOT AUTHORIZE THE SERVICE TO TERMINATE THE MANAGEMENT ZONE'S PROTECTIONS

"It is axiomatic" that an agency's power "is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). This is true "[r]egardless of how serious the problem an administrative agency seeks to address[.]" *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). Thus, when courts review agency actions, they must give binding effect to the text of a statute. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). And, if the text does not resolve the issue, the courts must nonetheless reject an agency's construction if it is unreasonable, considering the statute as a whole and its purpose. *See id*. at 844.

A. The Statute Expressly Requires the Service To Implement the Management Zone's Protections

Congress has spoken to the question at issue in this case: whether, having accepted the authority to establish a new otter population, the Service must comply with the statute's mandatory language, including implementing the management zone's protections. Although the statute says that the Service "may" develop and implement a plan to establish the population, Pub. L. No. 99-625, § 1(b), it spells out several consequences of the Service's decision to do so.[4] These include that the plan "*must* be developed by regulation." Pub. L. No. 99-625, § 1(b) (emphasis added). That regulation "*shall* include" several elements, including the creation of a management zone. *Id.* (emphasis added). The Service "*shall*" treat any otter found within this zone "as a member of the experimental population"[5] and "*shall* use all feasible non-lethal

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[4] The Service and Intervenors rely heavily on the premise that, if the Service had declined this authority, none of the statute's mandates would have applied to it. This possibility does not change the outcome of this case however because the Service *did* accept and exercise this authority. 3 ER at 226-63. Furthermore, there's nothing to suggest that Congress doubted that the Service would develop and implement the plan. In fact, the Service had already indicated that, if it could establish a new sea otter population, it likely would. 2 ER at 64.

[5] Intervenors assert that seasonal migration of otters into the northern part of the management zone is an unforeseen change in circumstances that justifies departing from the text of the statute. However, the statute directly addresses this possibility by providing that the management zone's protections apply with respect to "any sea otter found within the management zone[.]" Pub. L. No. 99-625, § 1(b)(4). The only effect of this provision is to address the possibility that otters from the parent population may wander into the management zone.

means and measures" to capture them and remove them from the zone. *Id*. (emphasis added). Incidental take of otters within this zone "*may not* be treated as a violation of" the Endangered Species or Marine Mammal Protection Acts. *Id*. § 1(c)(2) (emphasis added). And, finally, under a provision titled "Implementation of Plan," the statute provides that the Service "*shall* implement" the regulation, with its required elements, after performing any requested consultations or April 1, 1986, if no consultations are requested. *Id*. § 1(d).[6]

This Court must give effect to the statute's several musts and shalls. Congress uses these terms to indicate that it is imposing mandatory, discretionless obligations. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007) ("By its terms, the statutory language ['shall'] is mandatory . . . ."); *Lopez v. Davis*, 531 U.S. 230, 240 (2001) (rejecting an interpretation that conflates "shall" with "may"). The most analogous precedent to this case is *National Association of Home Builders*, in which the Supreme Court ruled that the Endangered Species Act's

[6] The Service's argument that this provision merely forbids it from implementing the regulation prior to that date is belied by the text. If that's what Congress meant, it would have said that the Service "shall not" implement the plan "until" the prerequisites were satisfied, not that it "shall implement" it "after" that point. Pub. L. No. 99-625, § 1(d). This provision imposes an obligation to implement the plan's requirements after concluding consultations or April 1, 1986 (which has obviously long since past).

requirement that agencies insure that their actions will not jeopardize a protected species only applies to discretionary actions. 551 U.S. at 662-68. It does not excuse an agency from complying with actions that Congress has made mandatory by, for instance, adopting a statute that says the agency "shall" do something. *Id*. at 661-62. Similarly, here, the statute commands that, having exercised the authority to establish a new otter population, the Service "must" adopt the regulation with all of its mandatory elements and "shall implement" it. Pub. L. No. 99-625.

The straightforward meaning of the statute is reinforced by its purpose and legislative history. Several senators' statements in support of the bill that became Public Law No. 99-625 demonstrate that this was compromise legislation which simultaneously authorized the Service to pursue a plan to benefit the sea otter while providing certainty to those potentially effected that protections would be implemented for their benefit. Senator Chafee, for instance, noted that "[p]eople have been talking for years about the translocation of California sea otters" but "[l]ittle progress has been made . . . because of intense conflicts among the various interests and government agencies." 3 ER at 339. The statute resolved these conflicts because "[m]ost of the interests concerned were involved in drafting" it, causing it to "represent[] a consensus approach" that sought to protect both the otter and the

surrounding fishery. *Id*. Senator Cranston echoed this sentiment explaining that the statute's purpose was to "to chart a course for sea otter protection . . . while reducing the potential for conflict between sea otter protection actions and other resource uses." 3 ER at 341. The text of the statute itself confirms this dual purpose, explaining that the purpose of the management zone is to "facilitate the management of sea otters" *and* "prevent, to the maximum extent feasible, conflict with other fishery resources[.]" Pub. L. No. 99-625, § 1(b)(4).

In contrast, nothing in the statute purports to authorize the Service to singlehandedly decide that the statute's mandatory obligations are no longer binding on it. The Service fails to identify anything in the statute expressly authorizing it to terminate the management zone's protections and asserts (from this silence) that nothing constrains its decision to do so in any way. Fed. Def.'s Br. at 40 ("There is no reason to manufacture additional conditions on the Service's repeal authority in the face of P.L. 99-625's decision not to include any."). This too shows that the statute does not authorize the Service to relieve itself of its statutory obligations. Interpreting the statute to silently give the Service this authority, without providing any intelligible principle to guide its exercise, would run afoul of the nondelegation doctrine, thus the

interpretation must be rejected under the avoidance canon. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1133-34 (9th Cir. 2013).[7]

Intervenors' assertions that this reading of the statute is absurd fall short. Showing that a literal reading of a statute is absurd is a high bar. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (interpreting a statute to avoid "patently absurd consequences" is a "narrow exception to our normal rule of statutory construction" (quoting *United States v. Brown*, 333 U.S. 18, 27 (1948))). Its clear that Intervenors' argument is actually that the statute does not conform with their preferred policy, which is more similar to the Endangered Species Act's "whatever the cost" approach to protecting species. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). But, as this Court has held, the mere fact that competing policy goals could have been rationally balanced differently is no grounds for rejecting a statute's literal meaning. *See Arizona State Bd. for Charter Schools v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006). Congress' decision to balance promoting the sea otter against its impacts on individuals is not absurd. *Cf.*

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[7] The Service's and Intervenors' implication that the nondelegation doctrine is defunct, since it has only been used to strike down statutes twice, is clearly in error. The doctrine has been repeatedly relied upon when choosing between competing statutory interpretations, as the Fishermen ask the Court to do here. *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) ("One would not say that it is even rational [to ignore the costs of regulation.]").[8]

Finally, the Fishermen's interpretation of the statute is necessary to make the statute consistent with Congress' subsequent amendment of the Marine Mammal Protection Act. As the Supreme Court has explained, courts must interpret statutes with an eye toward subsequently enacted legislation to ensure that they make sense in combination. *See Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 143. In 1994, Congress amended the Marine Mammal Protection Act to relax its restrictions on incidental take during commercial fishing operations. *See* 16 U.S.C. § 1387. Despite the fact that the program had already failed by 1994 (in the Service's estimation), Congress excluded sea otters from this reform because it wished for Public Law No. 99-625 to continue to govern incidental take of this species. *See id*. § 1387(a)(4); *see also* H.R. Rep. No. 103-439 (Mar. 21, 1994) ("Taking of California sea otters is regulated under Public Law 99-625."). As the Fishermen explained in their opening brief, the Service's claimed authority to terminate Public Law No. 99-625's incidental take exemption is plainly inconsistent

[8] Intervenors' argument that any departure from the Endangered Species Act policy is absurd would also require the reversal of the Supreme Court's decision in *National Association of Home Builders*, which held that a statute's requirement that an agency "shall" do something was not subject to the Endangered Species Act because it was mandatory, not discretionary. 551 U.S. at 661-68. Despite the Fishermen raising this point in their opening brief, Intervenors make no attempt to answer it.

with Congress' express reliance on the continued implementation of that exemption when it reformed the Marine Mammal Protection Act. Opening Br. at 28-29. Neither the Service nor Intervenors offer any response to this argument.

B. The Service's Contrary Interpretation Is Unreasonable in Light of the Statute's Text, Purpose, and Legislative History

The court should also reject the Service's contrary interpretation—that the statute silently authorizes the Service to terminate the mandated protections, subject to no constraints[9]—because it is unreasonable in light of the statute's text, purpose, and legislative history. The Service's and Intervenors' efforts to find some support for this interpretation all fall short.

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[9] The only limitation on this authority that the Service acknowledges is the Administrative Procedure Act's ban on arbitrary agency actions. 5 U.S.C. § 706. This is an extremely meager limit, made all the more narrow by the fact that, in the Service's view, the statute poses no restrictions on the "relevant factors" on which it can base its decision. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) (agency decisions must be based on the relevant factors identified in the governing statute). Since this statute contains no such factors—it doesn't even mention this authority—the Service's decision would only be invalid, in its view, if it was so absurd or unsupportable as to be arbitrary in the abstract. In fact, even if the Service's decision was that arbitrary, the Service's interpretation would likely mean that it would be immune from judicial review anyway. *Cf. Building Industry Association of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1034-35 (9th Cir. 2015) (no judicial review of agency actions unless statute's text sets out standards to constrain the agency's authority).

1. The Service's and Intervenors' Interpretation Is Unreasonable Because It Conflicts with the Text and Overall Structure of the Statute

The Service and Intervenors attempt to find a home for their interpretation in several words or phrases which, if taken in isolation, they contend could be ambiguous enough to justify it. However, this is not how statutes are interpreted. *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014).[10] Each of the Service's and Intervenors' statutory arguments conflict with other provisions of the statute or fail as a matter of law.

First, the Service and Intervenors argue that the statute authorizes the Service to terminate the management zone's protections by providing that it "*may* develop and implement" the plan. If this were all that the statute said, it likely would be ambiguous enough to permit the Service's interpretation.[11] But the statute elaborates several consequences of the Service accepting this authority, including that it "must" adopt

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[10] "A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.' Thus, an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole' does not merit deference." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442 (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988), and *University of Tex. Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2529 (2013)).

[11] In support of its argument, the Service cites cases that only use permissive language. Fed. Def.'s Br. at 36. As the Fishermen explained in their opening brief, this statute is clearly distinguishable, because of its repeated use of mandatory language. Opening Br. at 30-31. The Service offers no response to this point.

a regulation that "shall" contain the management zone's protections, which the Service "shall implement." Pub. L. No. 99-625. The Service's reading of this single sentence would render much of the rest of the statute a dead letter. None of the provisions that expressly impose mandatory obligations on the Service would have effect because it would be free to disclaim them at any time and for any reason. This alone is enough to make the interpretation unreasonable. *See Lopez v. Davis*, 531 U.S. at 240 (rejecting an interpretation that conflates "shall" with "may").

The Service's over-reliance on the "may develop and implement" language also frustrates the statute's purpose. Under it, the Service was free to accept the benefits of the statute's compromise (the authority to establish the new otter population) then immediately turn around and disclaim the burdens that Congress attached to this authority (the management zone's protections). In fact, its decision to terminate these protections was based solely on the populations size three years into the experiment (now more than 20 years ago) and not, as the Service's and Intervenors' briefs imply, on the species' current condition. 2 ER at 84. According to the Service's regulation, it should have terminated the protections almost immediately after they went into effect. *Id.*; 3 ER at 245. As the Fishermen explained in their opening brief, this is unreasonable. In light of the timing in which each side of the compromise received its benefits—the Service received its immediately while the Fishermen received theirs only if the protections were implemented over the long term—Congress sensibly made

those conditions mandatory once the Service went forward, as governments routinely do when imposing conditions on development permits (which have similar timing issues). *See* Opening Br. at 32. Neither the Service nor the Intervenors offer any response to this point.[12]

Second, the Service argues that the statutory provision requiring the plan to be developed by "regulation" supports its interpretation. It asserts there is a "general rule of administrative law" that "agencies may, with reasoned explanation, repeal their own regulations." Fed. Def.'s Br. at 34. However, the cases in which the Service purports to find this rule do not go nearly as far as it would have them. *Romeiro de Silva v. Smith*, for instance, recognizes only that an agency's past adoption of a regulation does not, without more, forbid it from amending or repealing the regulation in the future. 773 F.2d 1021, 1025 (9th Cir. 1985). The case does not support the Service's argument that Congress can't require an agency to adopt and implement a regulation. Under the Service's reading of *Romeiro de Silva*, even if Congress expressly required an agency to adopt a particular regulation and implement it, the agency could adopt the regulation then promptly repeal it (thereby circumventing

[12] Intervenors briefly assert that the Service didn't get its benefit of the bargain because the plan wasn't as successful as it had hoped. Intervenor's Br. at 23 n.5. However, the Service's benefit under the statute is the authority to establish the otter population, not a guarantee that the population would grow as quickly as the Service might hope. Similarly, the Fishermen's benefit was limited to the incidental take exemption and the Service's use of feasible, nonlethal means to remove otters from the management zone.

Congress' command). This is clearly not a reasonable rule and is inconsistent with the basic foundation of administrative law—that agencies are subordinate to Congress. *Bowen*, 488 U.S. at 208.

Third, the Service and Intervenors argue that the statute's use of the phrase "experimental population" means that the agency's power must be the same under this statute as it would be under Section 10(j) of the Endangered Species Act, which also uses the phrase.[13] This argument fails because it ignores the numerous differences between the two statutes. Unlike this statute, Section 10(j) imposes no requirement that the Service "must" adopt regulations that "shall" contain certain elements which it "shall implement." *Compare* Pub. L. No. 99-625 *with* 16 U.S.C. § 1539(j). The mere fact that two statutes contain a common phrase suggests that particular phrase may need to be interpreted consistently, not that the differences in the other statutory language should be ignored. *Cf. Barber v. Thomas*, 560 U.S. 474, 483-84 (2010) (discussing presumption that phrases repeated in a statute have the same meaning). The legislative history reinforces this conclusion. Although Public Law No. 99-625 is "based on concepts similar to the Endangered Species Act[,]" it "is a freestanding provision[.]" 3 ER at 339.

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[13] The Intervenors go further, arguing that the straightforward reading of the statute must be wrong because, otherwise, the statute would conflict with a regulation that the Service has adopted under 10(j). 50 C.F.R. § 17.81(c)(4). But this argument gets administrative law exactly backwards. Regulations are tested against statutes, not the other way around. *See Bowen*, 488 U.S. at 208.

Fourth, the Service argues that its interpretation is consistent with the statute because the mandatory language only applies if there is a plan in place—since it has terminated the plan, the mandatory language does not apply. This argument assumes the answer to the very question in dispute and is thus mere question-begging. As the Fishermen have explained, by accepting the authority to establish San Nicolas Island's otter population, the Service is bound by the obligation to implement the regulation and its required elements.

2. The Service's and Intervenors' Interpretation Is Unreasonable Because It Undermines the Statute's Purpose

To support their atextual interpretation, the Service and Intervenors assert that protecting the sea otter (to the exclusion of all other considerations) was Congress' true or "primary" purpose in enacting the statute. Although protecting the sea otter was obviously one of the purposes Congress was pursuing, the Service's and Intervenors' myopic reliance on it has little support. The text of the statute, for instance, refers to Congress' purposes in requiring a management zone and its protections as (1) promoting the otter *and* (2) preventing conflict with other fishery resources. Pub. L. No. 99-625, § 1(b). This suggests that Congress' purpose was to balance these competing interests, not to pursue one to the exclusion of the other.

The legislative history for the statute reinforces this conclusion. True, Senators Chafee and Cranston expressed the view that protecting the otter influenced their

decision to support the bill. *See* 3 ER at 339-40. But this is hardly surprising (in light of the statutes dual purposes) and doesn't suggest that Congress wasn't balancing two competing interests. Taken in full, both senators's statements acknowledged the statute's dual objectives. As explained above, they acknowledged that progress was finally being made on this issue because a compromise had been reached between the Service, environmentalists, and the fishermen. 3 ER at 339 (describing the bill as a "consensus approach"). Senator Cranston, for example, expressly identified the statute's careful balancing of these competing interests as the reason for his support. 3 ER at 341 ("In the interest of protecting the California sea otter *and* making progress toward balancing the utilization of the resources of the California coast, I urge adoption of this legislation." (emphasis added)).

According to the Service's interpretation, it has unconstrained discretion to terminate the statute's mandatory elements. This interpretation frustrates Congress' efforts to balance competing interests. Under it, the Service had no obligation to respect Congress' balance but could avoid all of the mandatory obligations intended to protect the fishery and its users if doing so would benefit the sea otter. Yet this is clearly contrary to the statute's purpose.

The Service and Intervenors also try to defend their interpretation by relying on Senator Breaux's statements in support of an earlier bill, which ultimately did not pass. 3 ER at 295. As the Fishermen acknowledged in their opening briefs, Senator

Breaux expressly endorsed the idea that the Service could terminate the management zone's protections, though he made no attempt to identify how the similarly worded bill authorized this. Opening Br. at 34-35. This statement of a single senator cannot overcome the statute's text and clear purpose to balance competing interests. *See Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995). The Service argues that this statement is entitled to more weight because Senator Breaux was the sponsor of the failed bill. But this argument fails too because "even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling[.]" *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).[14]

The bigger problem with the Service's and Intervenors' heavy reliance on Senator Breaux's statement, however, is that it is not from the debates over the bill that became Public Law No. 99-625. There's no evidence that the legislators who passed the bill were even aware of its existence. Legislative history can be helpful only to the extent it provides a clear indication of Congress' intent at the time that it enacted a law. *See Gustafson v. Alloyd Company, Inc.*, 513 U.S. 561, 580 (1995) (legislative history is helpful only if it is material that was before the legislators when

[14] In *GTE Sylvania*, the statement was made by the bill's sponsor during the debate over its enactment, and yet the Court still gave it little weight. 447 U.S. at 118. Senator Breaux, however, sponsored a different bill, which was not enacted, and his statement was not made during the debates over the bill that became Public Law No. 99-625.

they voted); *see also GTE Sylvania*, 447 U.S. at 118-19 (post-enactment legislative history is unhelpful); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 835-36 (9th Cir. 1996) (same). A statement of a single senator regarding a different, earlier bill does not provide a clear indication of Congress' views as a whole when they passed Public Law No. 99-625. *See In re Catapult Entertainment, Inc.*, 165 F.3d 747, 753-54 (9th Cir. 1999) (a committee report on an earlier, failed bill is not compelling legislative history for a later, enacted one because "the report relates to a different proposed bill, predates enactment [of the bill that passed] by several years, and expresses at most the thoughts of only one committee in the House"). Neither the Service nor Intervenors offer anything more than conjecture as to why this isolated statement by a single senator made outside the debate over the statute is deserving of controlling weight or sufficient to overcome the statute's text.[15]

CONCLUSION

The statute expressly conditions the Service's authority to move otters into Southern California on the obligation that it "must" adopt a regulation that "shall" contain a management zone and protections for the surrounding fishery, which it "shall implement." Pub. L. No. 99-625. It gives the Service no authority to unilaterally

[15] Intervenors also briefly mention the settlement in *The Otter Project v. Salazar*, which some of the Fishermen participated in. No. 09-cv-04610 (N.D. Cal. settled Nov. 23, 2010). To be clear, that settlement expressly preserves the Fishermen's ability to challenge the Service's actions as inconsistent with the statute. *See id.*, Doc. 66, ¶¶ 8, 10, 15.

relieve itself of these obligation. The Fishermen's petition, seeking to restore Congress' compromise, should have been granted.

DATED: July 20, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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DATED: July 20, 2016.

s/ Jonathan Wood
Attorney for Plaintiffs-Appellants

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