IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH DISTRICT, DIVISION THREE

FRIENDS OF THE CHILDREN'S POOL, Respondent and Petitioner, **v.** **THE CITY OF SAN DIEGO AND CALIFORNIA COASTAL COMMISSION,** Appellants and Respondents.	Case Nos. G053709 & G053725

Orange County Superior Court, Case No. 37-2015-00778153
The Hon. Frederick P. Horn, Judge

APPELLANT CALIFORNIA COASTAL COMMISSION'S OPENING BRIEF

KATHLEEN A. KENEALY
Acting Attorney General of California
JOHN A. SAURENMAN
Senior Assistant Attorney General
ANDREW M. VOGEL
Acting Supervising Deputy Attorney General
BAINE P. KERR
Deputy Attorney General
State Bar No. 265894
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 620-2210
Fax: (213) 897-2801
E-mail: Baine.Kerr@doj.ca.gov
Attorneys for Appellant California Coastal Commission

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INTRODUCTION

This case is the latest chapter in a long-running series of lawsuits regarding public access at the Children's Pool Beach in the La Jolla area of San Diego. The beach is a small, sheltered, artificial cove that was built in 1931. A colony of harbor seals has inhabited the beach since 1990's. The presence of the seals at the beach has caused conflict in San Diego between those who would protect the seals and those who favor public beach access despite the seals' presence. It has also led to dangerous interactions between people and seals. Appellant City of San Diego, which owns the beach in trust for the public, has tried various measures to address these conflicts. In 2014, the City, with appellant California Coastal Commission's approval, enacted an ordinance closing the beach during the seals' pupping season, which runs from December through May. This lawsuit followed.

Respondent Friends of the Children's Pool filed a petition for an writ of administrative mandate to set aside the City and Commission actions, alleging that they were preempted by the federal Marine Mammal Protection Act (MMPA) and violated the terms of the Coastal Act and the Legislative grant of the beach to the City. Applying the incorrect standard of review, the trial court agreed, and also concluded that appellants failed to follow the federal Administrative Procedures Act.

The trial court erred. The seasonal beach closure is a municipal ordinance regulating public access to state tidelands that the Commission approved pursuant to the Coastal Act. State and local government regulation of access to public property in the interest of public safety and public trust resources is a core government function. The language and purpose of the MMPA show that Congress did not intend to preempt such regulation even if it reduces the harassment of marine mammals.

Accordingly, the City's and Commission's actions can be reconciled with the MMPA.

The challenged actions are also consistent with state law. The terms of the Legislature's grant of the tidelands to the City allow for a variety of public trust uses at the beach, including as a "marine mammal park," and the Coastal Act authorizes the Commission to regulate the time, place, and manner of public access. Here, substantial evidence in the record shows the Commission did not abuse its discretion. In addition, the federal Administrative Procedures Act has no bearing on the actions of state and local governments and therefore is inapplicable.

The Commission respectfully requests that the judgment be reversed.

STATEMENT OF APPEALABILITY

The trial court's Judgment Granting the Petition for Writ of Mandate (AA 567-586) is a final judgment under Code of Civil Procedure section 1064.[1] As such, the judgment is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(1).)

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[1] "AA" refers to Appellants' Joint Appendix, a copy of which is filed herewith. An electronic copy of the administrative record and an electronic copy of the reporter's transcript will be filed with the City's Opening Brief. Citations to the administrative record are formatted as: (volume AR page), and citations to the reporter's transcript are designated "RT."

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Children's Pool and City Proceedings

The Children's Pool is a sheltered cove in the La Jolla area of San Diego.[2] In 1931, a prominent San Diego philanthropist donated construction of a curved breakwater around the cove to shelter the area from waves. At that time, the State — which would otherwise be responsible for the tidelands — granted the beach area to the City of San Diego in trust for the public. (16 AR 4083-4084.) The Children's Pool filled with sand over the years, and in the 1990's a colony of harbor seals established a rookery there.[3] (8 AR 1853.) With increased seal population, the water quality at the Children's Pool diminished. Since 1997, the San Diego Public Health Department has advised against entering the water in that area. (8 AR 1853.)

Children's Pool is unusual among seal rookeries in California. There is no other mainland seal rookery south of Ventura. Other rookeries are restricted to the public either by geography or by law. (8 AR 1857.) Only Children's Pool is in an urban setting and accessible to the public. As a result, the seals that rest there are vulnerable to human harassment and disruption. Defensive seal nips and bites also present a risk to public health and safety. (8 AR 1859; 15 AR 4018.)

As the seal population at Children's Pool grew, the City found itself buffeted between people who wanted to protect the area for the seals, and people who wanted the seals cleared out so that the public would have complete access to the beach. In 2005, a citizen in favor of public access

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[2] The Commission refers to "Children's Pool" or the "beach" to describe both the dry and wet portions of the beach.

[3] A rookery is a place where seals gather to breed. (21 AR 5670.)

obtained a judgment, based upon the language the State's 1931 trust grant, directing the City to remove the seals from the beach and clean the sand. After an unsuccessful appeal, the City began efforts to do so. But in 2010 the State amended its trust grant to the City to specifically allow the City to use the property for a "marine mammal park." (16 AR 4083-4084.) The judgment was vacated. (8 AR 1854.)

Starting in 2006, in an effort to address the competing demands of its citizenry, the City installed a rope barrier just upland of the mean high tide line during pupping season, with an opening on one end to allow for public access to the beach. (8 AR 1854.) Pupping season is the time when the seals are pregnant, birthing, and nursing, and generally falls from December to May. (15 AR 4019.) During pupping season, more seals have been recorded on the beach, and seals remain on the beach for longer periods of time than during other parts of the year. (*Ibid.*) In addition, mother seals are more aggressive when their pups are present. (*Ibid.*)

In 2007, the National Marine Fisheries Service (NMFS) — the federal agency responsible for enforcing the MMPA — wrote to the San Diego City Attorney to express concern about seal harassment at the Children's Pool. It noted that the rope barrier was a visible deterrent to people approaching the seals, but also said the barrier "did not deter []'determined' individuals(s) from approaching the seals." (21 AR 5671.) NMFS "strongly recommend[ed] that the City close the [Children's Pool] starting December 15 through May 30." (*Ibid.*)

In 2010, NMFS again advised the City that human presence on the beach was harmful to the seals because it caused them to stampede into the water, a behavior known as "flushing." (21 AR 5666.) This was disruptive for the seals, which require onshore rest. But it was particularly harmful during the pupping season, when female seals spent more time onshore, and seal pups could be injured by stampeding adults or separated from their

mothers. (*Ibid*; see also 8 AR 1860.) NMFS reiterated its support for a seasonal closure of the beach to the public during pupping season, from December 1 to May 30. (21 AR 5666.) Furthermore, NMFS stated that although it is responsible for administering the MMPA and received 154 calls about the Children's Pool in 2009, "limited staffing creates a challenge." (21 AR 5667.) NMFS noted that, notwithstanding the MMPA's preemption provision, "states and local governments are free to implement and enforce ordinances, such as the closure of a beach, which may have a side benefit of preventing the harassment of a marine mammal." (*Ibid.*)

In May 2010, the City Council adopted a shared-use policy with five components: 1) a year-round rope barrier; 2) clear signage to explain the rules; 3) a prohibition on dogs; 4) a full-time park ranger; and 5) a prohibition on public access to the beach during pupping season. (8 AR 1855; 15 AR 4013.) The shared-use policy was designed to address public safety problems because police were regularly called to respond to disturbances at the Children's Pool. (15 AR 4027.) Between February 1, 2009 and January 21, 2010, there were 184 police responses to incidents at Children's Pool, including 37 calls for disturbing the peace and four calls for battery. (*Ibid.*) The City initially implemented the first four shared-use policies, but friction at the Children's Pool continued. A camera captured video footage of people crossing the rope barrier and kicking and harassing the seals. (8 AR 1856; 15 AR 3895 [video footage].) The Seal Conservancy observed 269 flushing incidents in a one-year period from 2013-2014. (*Ibid.*) Beachgoers also ignored and vandalized the rope barrier. (8 AR 1861.)

Conflict between people defending the seals and people seeking access to the beach continued. People protested the use of the rope barrier with multiple demonstrations on the beach and also encouraged others to

disregard the rope guidelines. (8 AR 1864.) Pursuant to the shared-use policy, a park ranger or lifeguard was stationed full time at the beach. (*Ibid.*) Park rangers or lifeguards were regularly called on to intervene in or mediate conflicts. (*Ibid.*) When lifeguards were asked to defuse conflicts over the seals at Children's Pool, it took them away from their duties to protect swimmers from danger and drowning. (*Ibid.*)

The City moved forward with the last of its shared-use measures, to close the sandy beach during pupping season. The City expected seasonal closure of the beach to result in less enforcement time for the assigned park rangers and lifeguards and less police involvement, and also to provide more clarity to the public than the rope barrier. (8 AR 1864-1865.) It would also continue to promote public access to the shoreline, as viewing the seals was often the primary purpose of a visit to Children's Pool, and the presence of the seals drew a huge number of people to that area of the coast. The seasonal closure would allow continued viewing of the seals from shore and from the breakwater surrounding the cove. (8 AR 1864.)

To effect the seasonal closure, the City made two concurrent applications to the Coastal Commission. The first was a request to amend the City's local coastal program, a planning document governing land use on the coast that is subject to Commission certification. (1 AR 0003.) The local coastal program amendment would allow for seasonal closure at the Children's Pool during pupping season. (*Ibid.*) The second was an application for a coastal development permit to specifically close the Children's Pool from December 15 to May 15 of each year. (15 AR 3948.) The closure would prohibit people from walking down the stairs to the sandy beach during that time period, while the walking path atop the breakwater would stay open all year. (15 AR 3950-3954.) NMFS weighed in again, this time stating that it did not believe that beach closure was

necessary and noting the MMPA's preemption provisions. (9 AR 2278-2279.)

B. Proceedings Before the California Coastal Commission

The Commission considered both applications at its August 14, 2014 meeting. (23 AR 6196, 6197.) The Commission found that a seasonal beach closure was consistent with the Coastal Act, Public Resources Code section 33000 et. seq. [4] (23 AR 3695; 8 AR 1850-1868.) The Commission found that the Children's Pool required intervention because it was a seal habitat in an urban environment with a long history of discord. (8 AR 1860-1863.) The Commission approved the local coastal program amendment. It also approved the coastal development permit, but it imposed conditions limiting the permit's terms to five years, requiring the City to submit annual monitoring reports evaluating the effectiveness of public access restrictions, and requiring a comprehensive signage program. (15 AR 4007-4009.)

C. Trial Court Proceedings

Petitioner filed a petition for writ of administrative mandate on October 10, 2014. (AA 10-32.) Petitioner filed a first amended petition for writ of administrative mandate on December 1, 2014. (AA 43.) The first amended petition alleged that the seasonal closure was preempted by the MMPA and violated the California Constitution and the Coastal Act. (AA 38-42.) After transfer of the action to Orange County Superior Court, a hearing on the merits of the first amended petition was held on March 16, 2016. (AA 178; RT 1.) At the hearing, the court and counsel for the Commission addressed the proper standard of review, with the

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[4] Subsequent statutory citations are to the Public Resources Code, unless otherwise indicated.

Commission's counsel arguing the court should review the Commission's decision for abuse of discretion pursuant to Code of Civil Procedure section 1094.5. (RT 4-5.) The court questioned whether federal agencies had consulted on and approved of the seasonal closure. (RT 8.) Petitioner argued that the Commission's seasonal closure was preempted by the MMPA. (RT 10-12.) The court took the matter under submission. (RT 12.)

On May 3, 2016, the trial court entered a statement of decision. (AA 550-566.) Applying an independent judgment standard of review, the court found that the Commission and City actions were preempted by the MMPA and violated the Coastal Act. (AA 550-551.) It also found that the Commission and City were required, but failed, to follow the federal Administrative Procedure Act. (*Id.* at 563-564.) No party briefed the applicability of the Administrative Procedure Act or discussed it at the hearing. (AA at 225; 458; 479; 502; see RT 1-12.) Petitioner prepared and filed a proposed judgment; notice of entry of judgment was filed and served on June 24, 2016. (AA 588.) This appeal followed. (AA 618.)

STATUTORY FRAMEWORK

THE CALIFORNIA COASTAL ACT AND REGULATION OF COASTAL DEVELOPMENT

The Coastal Act is a comprehensive scheme governing land use planning for the entire coastal zone of California. (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 793.) The Coastal Act's policies include preserving marine and land resources, providing public coastal access and recreation opportunities, and protecting the coastal-related economic environment. (§§ 30001-30004; 30210-30244.) The Coastal Act generally requires a coastal development permit for development in the coastal zone . (§ 30600, subd. (a).) The Coastal Act

defines development very broadly, and it includes "change in the density or intensity of use of land," and "change in the intensity of use of water, or of access thereto." (§ 30106.)

The Coastal Act requires that each local government with land in the coastal zone prepare a local coastal program that implements the Coastal Act's policies. (§ 30500, subd. (a).) The Commission certifies local coastal programs to ensure consistency with the Coastal Act. (§§ 30512, 30513.) Any amendment to a local coastal program also requires the Commission's certification. (§ 30514.) Thus, a local coastal program and the development permits issued pursuant to the Coastal Act are not solely matters of local law but embody state policy. (*Pacific Palisades Bowl v. City of Los Angeles*, *supra*, 55 Cal.4th at p. 794.) A fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government. (*Ibid.*)

Once a local coastal program is certified, the local government exercises permit-issuing authority. (§ 30519.) The Commission retains permitting responsibility for the area of its original jurisdiction, which includes "tidelands, submerged lands, or . . . public trust lands." (§ 30519, subd. (b).) California acquired its tidelands upon its admission to the Union as an attribute of its sovereignty. (*Ill. C. R. Co. v. Illinois* (1892) 146 U.S. 387, 456; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482.) Although the State owns these lands, its interest "is not of a proprietary nature. Rather, the state holds such lands in trust for public purposes." (*City of Long Beach*, *supra* at p. 482; see Civ. Code, § 670; *People ex. rel. Webb v. California Fish Co.* (1913) 166 Cal. 576, 584-585 [describing public trust].) These purposes include wildlife habitat preservation, swimming, and bathing. (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260.)

The Legislature may grant tidelands to localities, as it granted the area of Children's Pool to the City of San Diego in 1931. (16 AR 4083.)

As trustee, the City must manage these lands in a manner consistent with the grant and the public trust. (§§ 6009, subd. (d), 6305; *Marks v. Whitney* (1971) 6 Cal.3d 251, 259.) The Children's Pool is an area of historic tidelands, and therefore within the Commission's original jurisdiction. (16 AR 4003, 4051.) Thus, in order to close the beach to the public for part of the year, the City required both an amendment to its local coastal program and a coastal development permit from the Commission. (See §§ 30514; 30601.)

ARGUMENT

I. STANDARD OF REVIEW AND PRESUMPTIONS

Commission decisions may be challenged by a petition for writ of administrative mandamus under Code of Civil Procedure section 1094.5. (§ 30801.) In reviewing the Commission's decision, the trial court must determine whether 1) the Commission proceeded within its jurisdiction, 2) there was a fair hearing, and 3) the Commission abused its discretion. (*Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 921.) Code of Civil Procedure section 1094.5, subdivision (b), provides that abuse of discretion is "established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by substantial evidence."[5]

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[5] The trial court incorrectly applied an independent judgment standard of review. (See AA 557-558.) It relied on authority pertinent to the adjudication of a vested right, such as employment status, rather than the well-established substantial evidence standard of review governing the Commission's permitting decisions. (Compare *San Diego Unified School Dist. v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1140-1142 [applying independent standard of review] with *Ross v. California Coastal Com., supra*, 199 Cal.App.4th at p. 921.) Nevertheless, such a trial court error "is purely academic," because in a mandamus action the Court of Appeal does not undertake "a review of the trial court's

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This Court's scope of review "is identical to that of the trial court. [Citations.]" (*Ross, supra*, 199 Cal.App.4th at p. 1595.) Thus, this Court should examine "all relevant materials in the entire administrative record to determine whether the agency's decision is supported by substantial evidence." (*Ibid.* [citing *Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1212; *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 334–335].)

An administrative agency's decision is presumed to be supported by substantial evidence, and a petitioner challenging a decision bears the burden to show there is no substantial evidence whatsoever to support the findings of the agency. (*Ross v. California Coastal Com., supra*, 199 Cal.App.4th at p. 921.) Any reasonable doubts must be resolved in favor of the Commission. (*Paoli v. California Coastal Com.* (1986) 178 Cal.App.3d 544, 550.) A reviewing court may reverse the Commission's decision only if, based on the evidence before it, a reasonable person could not have reached the Commission's conclusion. (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 503.) The court may not disregard or overturn an administrative agency's finding of fact simply because it considers that a contrary finding would have been equally or more reasonable. (*Boreta Enterprises, Inc. v. Department of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94.)

Substantial evidence upon which a Commission decision may rely includes opinion evidence of experts, oral presentations at the public hearing, photographic evidence, and written materials prepared by staff. (*Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d

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(...continued)
findings or conclusions," and instead reviews the matter "without reference to the trial court's actions." (*Friends of the Old Trees v. Department of Forestry* (1997) 52 Cal.App.4th 1383, 1393.)

240, 261; *City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472; *Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 532, 536.) The Commission is the sole arbiter of the evidence and sole judge of the credibility of the witnesses. (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971.)

The Court reviews questions of law—including whether a state law or regulation is preempted—de novo, and the "party who asserts that a state law is preempted bears the burden of so demonstrating." (*In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088, 1089 n. 10.) The Commission's interpretation of the statutes and regulations under which it operates is entitled to deference, given the Commission's special familiarity with those regulatory and legal issues. (*Ross v. California Coastal Com.*, *supra*, 199 Cal.App.4th at p. 938; *Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 849; § 30625, subd. (e) [Commission decisions to guide future actions of local governments].) A federal agency's determination of the scope of preemption of a statute under which it operates is likewise entitled to special consideration. (*Wyeth v. Levine* (2009) 555 U.S. 555, 565.)

II. THE MARINE MAMMAL PROTECTION ACT DID NOT PREEMPT THE CITY AND COMMISSION ACTIONS

The trial court determined that the MMPA preempted the Commission's approval of the seasonal closure of the Children's Pool. It reasoned that the Commission's action "related to" the take of marine mammals, and thus was preempted pursuant to title 16 of the United States Code, section 1379(a) (hereafter "section 1379(a)"). (AA at 559, 564.) The trial court was incorrect.

Regulating access to public trust tidelands and protecting public safety are core functions of state and local governments and presumptively are not subject to federal preemption. The record shows that the seasonal closure of the beach was required to prevent conflict between individuals in favor of increased public access and those opposed to it, and to minimize potentially dangerous interactions between seals and humans. Thus, the Commission's action did not "relate to" the take of a marine mammal species within the meaning of section 1379(a). Moreover, the congressional purpose of the MMPA and the federal government's interpretation of section 1379(a) demonstrate that state and local actions that have an effect of protecting marine mammals are not preempted. Therefore, section 1379(a) did not preempt the seasonal closure of the beach.

A. Federal Preemption

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Under this constitutional principle, "Congress has the power to preempt state law." (*Arizona v. United States* (2012) 132 S.Ct. 2492, 2500.) "In determining whether federal legislation preempts state law, '[c]ongressional purpose is the 'ultimate touchstone'" of a judicial inquiry. (*People ex. rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 724 [finding no "clear and manifest purpose of Congress" to bar California's regulation of the nonsale distribution of cigarettes to minors or adults].)

The Supreme Court has identified three analytical categories under which federal laws preempt state laws: (1) express preemption; (2) field preemption, when federal law so dominantly regulates a field as to imply Congress's intent to preempt state law; and (3) conflict preemption, when

the state law conflicts with the federal law such that it is impossible for a party to comply with both state and federal law, or state law is an obstacle to the objectives of Congress. (*English v. General Electric* (1990) 496 U.S. 72, 78-79.) The trial court found that express preemption applied here because the terms of the MMPA address preemption. (AA 559.)

Any of the preemption doctrines, however, are subject to a presumption against preemption of traditional state functions. "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... [a] Federal Act unless that [is] the clear and manifest purpose of Congress.'" (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923.) Thus, when addressing questions of express or implied preemption, if "the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors preemption.'" (*Altria Group, Inc. v. Good* (2008) 555 U.S. 70, 77.)

B. The Presumption Against Federal Preemption Applies

The presumption against federal preemption applies here because managing sovereign tidelands and exercising police powers are core state government functions. This presumption applies "to the *existence* as well as the *scope* of preemption." (*In re Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1088 (emphasis in original).)

Tidelands — the coastal areas covered and uncovered by the tides — have special legal significance as property held in trust by California in its sovereign capacity. (See *Ill. C. R. Co. v. Illinois*, *supra*, 146 U.S. at p. 456; *City of Long Beach v. Mansell*, *supra*, 3 Cal.3d at p. 482.) "The power of the state to control, regulate, and utilize its navigable waterways and the lands beneath them . . . is absolute." (*Marks v. Whitney*, *supra*, 6 Cal.3d at p. 260; *Nat'l Audubon Society v. Superior Court* (1982) 33 Cal.3d 419, 426

["the core of the public trust doctrine is the state's authority as sovereign to exercise [] continuous supervision and control"].) The State has broad discretion to use tidelands for public trust purposes, including ecological protection and the preservation of lands in their natural state for scenic or aesthetic purposes. (See *Marks*, *supra*, at pp. 259-260.)

And, in regulating coastal development and access to the tidelands at Children's Pool, the Commission exercised the state's police power, which the 10th Amendment to the Constitution reserves to states. (*Nollan v. Coastal Commission* (1986) 483 U.S. 825, 836 [Commission exercises police power when prohibiting or permitting coastal development]; *EEOC v. Wyoming* (1983) 460 U.S. 226, 239 ["The management of state parks is clearly a traditional state function . . . ."]; *Hodel v. Va. Surface Mining & Reclamation Ass'n* (1981) 452 U.S. 264, 291.) Likewise, the City exercised its police power in adopting its ordinance mandating seasonal closure of the beach. (*Belle Terre v. Boras* (1974) 416 U.S. 1, 9 [land use and zoning regulations proper exercises of police power].)

As discussed *infra*, in the MMPA, Congress did not make a "clear and manifest" statement that it intended to displace the State's authority to regulate access to its coast, or the ability of local governments to police access to City parks. (*In re Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at pp. 1095-1096 [applying presumption against preemption to find no clear and manifest Congressional intent to preclude state law claims].) Therefore, respondent cannot carry its burden to show that the Commission's actions were preempted.

C. The City and Commission Actions Did Not "Relate to" The Take of a Marine Mammal Within the Meaning of Section 1379(a)

The MMPA prohibits some state regulation of marine mammals:

> no State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species . . . to the State.[6]

(§ 1379(a).) The Secretary of Commerce has not transferred management authority for harbor seals to California. (21 AR 5666.)

The statutory language of section 1379(a) should not be construed to preempt the Commission's regulation of access to sovereign tidelands or the City's management of a public park. The phrase "relating to" indicates a broad preemptive purpose, but "[a]t the same time, the breadth of the words 'related to' does not mean the sky is the limit." (*Godfrey v. Oakland Port Services Corp.* (2014) 230 Cal.App.4th 1267, 1276 (quoting *Dan's City Used Cars, Inc. v. Pelkey* (2013) 569 U.S. ___ [133 S.Ct. 1769, 1778].) Applying "the 'relate to' provision according to its terms [is] . . . doomed to failure, since . . . everything is related to everything else." (*Cal. Division of Labor Standards Enforcement v. Dillingham Construction* (1997) 519 U.S. 316, 335 (conc. opn. of Scalia, J.).) Therefore, a "'relate

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[6] "Take" is defined in the MMPA as "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill." (16 U.S.C. §§ 1372, 1362(13).) "Harassment" includes "any act of pursuit, torment, or annoyance which . . . has the potential to disturb a marine mammal . . . by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." (16 U.S.C. § 1362(18)(A).) The "take" of a marine mammal without a permit can result in civil or criminal penalties. (16 U.S.C. § 1375.)

to' clause of [a] preemption provision is meant, not to set forth a *test* for preemption, but rather to identify the field in which ordinary *field preemption* . . . and, of course, ordinary conflict preemption" applies. (*Ibid.* (emphasis in original).)

Thus, the "relate to" language here can be best understood as referring to state regulation that directly impacts its subject in a way that is at odds with the federal statute. A state regulation with an "indirect and tenuous" effect on a preempted subject does not "relate to" it for preemption purposes. (*CPF Agency Corp. v. Sevel's 24 Hour Towing Service* (2005) 132 Cal.App.4th 1034, 1055.) Nor does a state regulation that does not frustrate a federal statute's purpose. (See *Gobeille v. Liberty Mut. Ins. Co.* (2016) 136 S.Ct. 936, 943 [ERISA's "relate to" provision only preempts state laws that govern a central matter of plan administration or interfere with nationally uniform plan administration]; *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1189 [state law not "related to" prices, routes, and services because its effect was indirect, remote, and tenuous, and did not frustrate federal statute's purpose]; *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation* (9th Cir. 2011) 410 F.3d 492, 502 [no preemption found].)[7]

Here, the Commission's regulation of access to the Children's Pool did not "relate to" the take of a species of marine mammal within the meaning of section 1379(a).[8] Rather, the City and Commission applied

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[7] Federal circuit court opinions do not bind California courts, but they "may serve as persuasive authority." (*People v. Memro* (1995) 11 Cal.4th 786, 882.)

[8] The Commission's also was not a "take" as defined in the federal statute because the beach closure did not "harass, hunt, capture, or kill" any marine mammal. (16 U.S.C. § 1372.)

laws of general applicability—a municipal ordinance and the Coastal Act—to regulate the time and manner of public access to the beach. (See *American Airlines v. Wolens* (1995) 513 U.S. 219, 237 (conc. & dis. opn. of Stevens, J.) [insufficient evidence of congressional intent to supersede law of general applicability]; cf. *Rowe v. N.H. Motor Transp. Ass'n* (2008) 552 U.S. 364, 375-376 [finding preemption where state law not general and did not affect truckers solely in their capacity as members of the general public].) The regulation was a necessary public safety measure: antagonism between people in favor of and against the seals' presence on the beach had escalated to such an extent that municipal intervention was necessary. (15 AR 4027.) Police and lifeguards were regularly called to the beach to regulate interactions between human beachgoers and the seals, and also in response to disorder among members of the public. (*Ibid.*) The inordinate resources required to police the beach detracted from law enforcement and lifeguard patrols elsewhere in La Jolla. (8 AR 1864; 15 AR 4027.) And the rope barrier and other shared-use measures did not effectively address the problems at Children's Pool. (*Ibid.*)

The beach closure was directed to the seals' pupping season, rather than a year-round closure, as a further accommodation of the public interest. Many of the law enforcement calls to the beach related to interactions between the seals and humans, and there were instances of seals biting and nipping humans who approached them. (15 AR 4017-4018.) More seals are on shore during pupping season, the seals remain on shore for longer periods during that time, and are also more aggressive toward humans. (15 AR 4016, 4017, 4019.) Thus, the closure of the beach during the seals' pupping season protected public safety and addressed the conflict over the seals' presence.

Admittedly, the Commission's action "related to" the take of marine mammals species in a certain sense, because the problems at the Children's

Pool arose from the presence of the seals and the seasonal closure will indirectly reduce take. (See *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, *supra*, 152 F.3d at p. 1189.) But the seasonal closure was not preempted because it does not directly regulate marine mammal harassment. It does not establish rules about how people interact with the seals and does not establish penalties for behavior that disturbs the seals. (See 1 AR 11-12 [ordinance adopted by City].) Rather, it was a land use regulation addressing hours of operation of a public park in order to reduce disorderly public conduct. Thus, it did not fall into the "field of laws" regulating the take of a marine mammal species. (*Ibid.* [interpreting "relate to" provision according to test for ordinary field preemption].)[9]

D. The MMPA's Purpose Was Furthered, Not Frustrated, by the Seasonal Closure of the Children's Pool

Congressional purpose is the "ultimate touchstone" of a preemption inquiry, and any reduction in take of marine mammals that might result from the seasonal closure of the beach is consistent with the MMPA's congressional purpose. (*People ex. rel. Lockyer v. R.J. Reynolds Tobacco Co.*, *supra*, 37 Cal.4th at p. 724.) In enacting the MMPA, Congress found

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[9] Because the City and Commission did not directly regulate the take of a marine mammal species, this case contrasts with cases where lower federal courts found state laws preempted under section 1379(a). (Cf. *Fouke v. Mandel* (D. Md. 1974) 386 F.Supp. 1341, 1360 [state law banning importation of seal furs preempted by Fur Seal Act of 1966 and MMPA]; *Togiak v. U.S.* (D. D.C. 1974) 470 F.Supp. 423, 427 [Alaska law banning seal hunting preempted by MMPA's provision allowing for seal hunting by Native Alaskans].) It also contrasts with another lower federal court case that found express and conflict preemption of a state law under section 1379(a). (Cf. *UFO v. UFO Chuting of Hawaii, Inc. v. Young* (D. Haw. 2004) 327 F.Supp. 2d 1220, 1222, 1229-1230 [dismissed on other grounds, 380 F.Supp. 2d 1166] [state law regulating parasailing preempted].)

marine mammals "should be protected and encouraged to develop to the greatest extent feasible," and the "primary objective of their management should be to maintain the health and stability of the marine ecosystem." (16 U.S.C. § 1361(6).) The MMPA's text identifies as its "major objective" the prevention of stocks of marine mammals from diminishing "beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part . . . ." (16 U.S.C. § 1361(2).) The act also recognizes the need "to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions . . . ." (*Ibid.*) Here, the seasonal closure of the beach—which protected a seal rookery from "the adverse effect of man's actions"—furthered the purpose of the MMPA, and thus was not preempted. (*Ibid.*)

Moreover, the National Marine Fisheries Service—the federal agency responsible for administering the MMPA—opined that notwithstanding section 1379(a), state and local governments "are free to implement and enforce ordinances, such as the closure of a beach, which may have a side benefit of preventing harassment of a marine mammal." (21 AR 5667.)[10] This agency statement is persuasive authority that the Commission's action's did not frustrate the MMPA's purpose. (*Wyeth v. Levine*, *supra*, 555 U.S. at p. 566 ["while agencies have no special authority to pronounce on preemption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant

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[10] NMFS later wrote that it did not "believe that complete closure of the beach" is the only way of achieving protection for the seals during pupping season. (9 AR 2279.) It also noted the MMPA's preemption provision, without opining on its effect on the legality of the seasonal closure or altering its earlier conclusion that a beach closure would be consistent with the Act. (*Ibid.*)

ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"].)

The MMPA's legislative history further demonstrates that Congress did not intend to limit states' ability to provide sanctuaries for marine mammals. The report of the Committee on Merchant Marine and Fisheries of the House of Representatives concerning the MMPA makes clear that the act was not intended to interfere with state sanctuaries that protect marine mammals. The report states: "It is not the intention of this Committee to foreclose effective state programs and *protective measures such as sanctuaries* . . . ." (H.R. Rep. No. 92-707, at 28 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4161 (emphasis added)).[11] Similarly, the report states: "There is no intention or desire within the Committee to remove any incentive from the states . . . to protect animals residing within their jurisdictions . . . ." (H.R. Rep. No. 92-707, at 18 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4151.) "The purpose of this legislation is to prohibit the harassing, catching and killing of marine animals . . . ." (H.R. Rep. No. 92-707, at 11 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4144.) The foregoing shows that Congress intended for the MMPA to protect marine mammals and reduce their harassment. (See *State v. Arnariak* (Alaska 1997) 941 P.2d 154, 156 [section 1379(a) did not preempt Alaska's ability to regulate public access and firearm use at a walrus sanctuary].)

As discussed above, the seasonal closure did not directly relate to the take of a marine mammal species within the meaning of the MMPA's preemption provision; rather, it was a land use measure to address public

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[11] The Commission respectfully requests that the Court take judicial notice of the MMPA's legislative history as set forth in its Motion for Judicial Notice filed herewith pursuant to California Rules of Court, rule 8.252(a)(2).

conflict at a public beach. Further, the MMPA's purpose and legislative history demonstrate that Congress intended for states to protect marine mammal rookeries. Section 1379(a) is "susceptible of more than one plausible reading," and this Court should accept the reading that disfavors preemption and reverse the trial court's judgment. (*Altria Group, Inc. v. Good, supra*, 555 U.S. at p. 77.)[12]

III. THE COMMISSION DID NOT VIOLATE THE TERMS OF THE LEGISLATIVE GRANTS OF THE CHILDREN'S POOL OR THE COASTAL ACT'S PUBLIC ACCESS PROVISIONS

In the trial court, respondent argued that the Commission's restriction of public access to the Children's Pool violated the terms of the legislative grants of the tidelands to the City, and also violated the Coastal Act. (AA 241-244.) These contentions were not discussed at the hearing on the petition, and the trial court's Statement of Decision did not squarely address them.[13] (See RT at 11-12; AA 550-566.) Nevertheless, any claim

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[12] The trial court also found that the Commission and City did not have authority over the beach because they did not comply with the federal Administrative Procedures Act. (AA at 565-566.) The court was incorrect: that statute by its terms does not apply to state or local governments. (See 5 U.S.C. §§ 551(1) ["'agency'" means each authority of the Government of the United States"]; 701(b)(1) [same]; 702 [providing right to judicial review of "agency action" in federal court]; 704 [only "final agency actions" reviewable].)

[13] The trial court stated the "Court grants the petition . . . for. . . (3) declaring the City's LCP amendment and beach closure ordinance adopted in 2014, and the Commission's coastal development permit issued in 2014 and authorizing the same, are void, unenforceable, and are preempted by the public's right of access acquired under the Coastal Act, the California Constitution, and the terms of the legislation granting Children's Pool to the City." (AA 550-551.) The Statement's "Discussion" section found that a writ of mandate was warranted because the City and Commission's were pre-empted and there was no authorization

(continued...)

that a writ of mandate should issue on these grounds would be without merit.

A. The Seasonal Closure of the Beach Is Consistent With the Legislative Grants of the Public Trust Tidelands to the City

In the trial court, respondent argued the seasonal beach closure was preempted by state law because it was contrary to the public access the Legislature provided for Children's Pool in its tidelands grant to the City. (AA 241-244.) Respondent was incorrect.

In 1931, the Legislature granted the Children's Pool to the City in trust for the People of California. (See Stats. 1931, ch. 937, § 1; 16 AR 4083-4084.) In 2009, the Legislature amended the terms of the trust to provide in pertinent part: "(a) That said lands shall be devoted exclusively to public park, marine mammal park for the enjoyment and educational benefit of children, bathing pool for children, parkway, highway, playground and recreational purposes, and to such other uses as may be incident to, or convenient for the full enjoyment of such purposes." (*Ibid.*)

This statutory language did not preclude the Commission's limitations on public access. The statute lists "public park" and "marine mammal park for the enjoyment and educational benefit of children" as acceptable uses, indicating that the Legislature recognized that the beach could be shared by members of the public and the harbor seals. (See *People v. Garcia* (2016) 62 Cal.4th 1116, 1124 [terms in a list should be considered in their statutory context to give effect to the Legislature's purpose].) In addition, respondent's selective interpretation of the granting statute would nullify the Legislature's 2009 amendment that provided for a

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from the federal government to enact the seasonal closure under the federal Administrative Procedures Act. (AA 558-566.)

"marine mammal park," and improperly restrain the beach's public trust uses. (See *Marks v. Whitney*, *supra*, 6 Cal.3d at p. 259 ["[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs"].)

Moreover, the seasonal closure of the beach only partially restricted public access. Public access to the sandy beach was closed for five months of the year, but the breakwater around the beach area would remain open throughout the year. (*Ibid.*; see 8 AR 1885 [schematic depicting extent of breakwater]; 21 AR 5692 [photograph].) Thus, the public was still able to access the coast and observe the seal colony, and the City and Commission reasonably balanced the multiple uses the Legislature approved. (See *Carstens v. California Coastal Commission* (1986) 182 Cal.App.3d 277, 289 [the public trust doctrine as codified in the California Constitution "does not prevent the state from preferring one trust use over another"].) Based on the terms of the Legislative grants, a writ of mandate should not lie.

B. Substantial Evidence Shows the Commission's Action Was Consistent With the Coastal Act

Respondent further contended below that the Coastal Act precluded the Commission's action. (AA 241.) That argument is without merit.

The Coastal Act provides that development "shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization." (§ 30211.) But, it also states that "maximum access . . . shall be provided for all the people *consistent with public safety needs* and the need to protect public rights, rights of private property owners, and natural resources areas from overuse." (§ 30210; emphasis added.) And, "public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each

case." (§ 30214, subd. (a).) These facts and circumstances include "[t]he capacity of the site to sustain use and at what level of intensity." (§ 30214, subd. (a)(2).)

In addition to public access, Coastal Act policies support a wide variety of land uses that protect marine and land resources, recreational opportunities, the coastal-related economic environment, and scenic and visual resources. (§§ 30001-30004; 30210-30244.) Among these polices is the requirement that the Commission protect and support marine resources. (§ 30230.)

Thus, the Coastal Act does not require that the Commission favor public access over all other Coastal Act policies, as respondent argues. Instead, it vests the Commission with discretion to regulate public access in light of other considerations such as the need for public safety. (*City of San Diego v. California Coastal Com.* (1981) 119 Cal.App.3d 228, 234 [finding substantial evidence supporting the Commission's balancing of public safety and protection of natural resources]; *Carstens v. California Coastal Commission, supra*, 182 Cal.App.3d at p. 288 [Commission properly considered public access and economic development concerns when granting permit to San Onofre power plant].)

Here, respondent cannot meet its burden of proving that the Commission abused its discretion. Ample evidence in the record supports the seasonal restriction on public access at the Children's Pool. The Commission imposed the most limited restriction on public access that it could, leaving the breakwater open year-round and the sandy beach open seven months of the year. The breakwater allowed for other recreational opportunities, such as walking and fishing. (8 AR 1865; 15 AR 4028.)

The Commission found that many people visit the Children's Pool to watch the seals. The ability to closely observe seals in a natural environment is unique to this area of Southern California, and the seasonal

closure protects this passive public access and lower-cost recreational amenity. (8 AR 1866; 15 AR 4029.) In addition, the Commission noted that the seasonal closure only affects one small beach, whereas other nearby beaches that did not provide marine mammal habitat (and thus incite public conflict) would be open year-round. Those beaches also were more suitable for public access, because the water quality was not impaired. (15 AR 4028-4029.)

The City had tried numerous measures that were less restrictive on public access and had found they were insufficient to dissuade both seal harassment and public discord. (8 AR 1855-1856.) And, as discussed *ante*, the status quo presented significant public safety concerns. Therefore, substantial evidence supported the Commission's decision to limit public access in order to protect public safety and marine resources. The Commission "considered the conflicting policy concerns and fashioned a compromise to address the practical realities." (*Carstens v. California Coastal Commission, supra*, 182 Cal.App.3d at p. 288) Respondent cannot meet its burden of proving otherwise.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court reverse the trial court's judgment.

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Respectfully submitted,

KATHLEEN A. KENEALY
Acting Attorney General of California
JOHN A. SAURENMAN
Senior Assistant Attorney General
ANDREW M. VOGEL
Acting Supervising Deputy Attorney General

/s/ Baine P. Kerr
BAINE P. KERR
Deputy Attorney General
Attorneys for Appellant
California Coastal Commission