G053709

In the Court of Appeal
Fourth District of California
(Division 3)

FRIENDS OF THE CHILDREN'S POOL

Plaintiff and Respondent

vs.

THE CITY OF SAN DIEGO

Defendant and Appellant

COASTAL COMMISSION OF THE STATE OF CALIFORNIA

Defendant and Respondent

AMICUS CURIAE BRIEF OF THE SEAL CONSERVANCY IN SUPPORT OF APPELLANT CITY OF SAN DIEGO

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INTRODUCTION

The court below made two fundamental errors in deciding this case. The first is in its assumption that the federal government has and can exercise plenary authority over land that inarguably belongs to the City of San Diego ("City") and is under the exclusive jurisdiction of the City and the State of California.

The court's second error is in concluding that the City's exclusion of human traffic from its land is preempted by a federal statutory scheme that, first, has nothing to do with land management and, second, cannot operate to preclude the City's exercise of its exclusive jurisdiction over its proprietary land.

The trial court's decision was unaccompanied by substantial authority for its interpretation of the Preemption Doctrine, so it is difficult to determine how the court concluded that preemption – something that is not favored and is sparingly applied – is appropriate in this instance.

The concept of federal pre-emption derives from the Supremacy Clause of the United States Constitution and implicates fundamental notions of state sovereignty, the independence of state authority, Constitutional limits on enumerated federal powers and the United States' unique scheme of dual sovereignty. It calls into play the basic concepts undergirding the American federal system going back to the Founding. Accordingly, this brief is intended to provide this Court the historical, theoretical and Constitutional background on which the Court's decision must ultimately rest.

The Seal Conservancy ("Conservancy") is a non-profit organization of concerned citizens that has, for some years, acted on behalf of the harbor seals who have established a nursery for the birth and nurturing of their young; the voiceless ones whose only ability to be heard is through their human advocates. The Conservancy has acted in protection of the largely helpless mother seals not only through advocacy but by public education and even on-site monitoring and physical protection. It has also supported City efforts to secure its property and to exclude human traffic during certain critical times of year. The Conservancy is vitally concerned with the maintenance of the tremendous public and environmental resource of Southern California's only harbor seal rookery.

The briefs of the parties herein will doubtlessly include a detailed background to provide the factual setting of the dispute. So, Amici will not recount it here. For our purposes, the only necessary facts for the argument set forth herein is that California assumed ownership of its coast and tidelands on statehood. In 1931, the State of California granted the property at issue herein to the City of San Diego, in trust for certain purposes. The City remains legal owner thereof through that grant.

HISTORICAL BACKGROUND

Any analysis of a claim of federal preemption must be informed by a firm understanding of the sources and limitation of federal power and the extent of state sovereignty in our federal system. We beg the Court's indulgence, therefore, because it is our view that preemption cannot be understood in isolation from its historical underpinnings.

After years of ferment, the thirteen English colonies in North America declared, each in its order, their independence from Great Britain. In doing so, each colony declared itself a free and independent "state", by which it meant "a political body, or body politic". The Founders self-consciously chose the term "state" to describe a discrete, independent government exercising exclusive jurisdiction over a defined geographical area. By these acts each colony became a self-governing nation inheriting all sovereign rights and powers of the Crown within its borders. *Ware v. Hylton* (1796) 3 U.S. (Call.) 199, 223; *Alden v. Maine* (1999) 527 U.S. 706, 713.

Each state operated (and still operates) independently of every other State. Each established and maintained its own instruments of government, laws and methods of governing. *Ware v. Hylton*, *supra*, at 224

> "Before these solemn acts of separation from the Crown of Great Britain, the war between Great Britain and the United Colonies, jointly, and separately, was a civil war; but instantly, on that great and ever memorable event, the war changed its nature, and became a PUBLIC war between independent governments; and immediately thereupon ALL the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; and all the former political connection between Great Britain and Virginia, and also between their respective subjects, were totally dissolved; and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France. Vatt. Lib. 3. c. 18, s. 292. to 295. lib. 3. c. 5. s. 70. 72 and 73." *Id.*

The separate and complete sovereignty of the original states was sufficiently important to the founding generation that it enshrined

it in their first formal treaty, the Articles of Confederation, Article II.[1] The States' succession to the sovereignty of the Crown has repeatedly been reaffirmed by the Supreme Court. (*Ware v. Hylton*, supra; *Martin v. Waddell* 41 U.S. 367 at 367 (1842) ("When the Revolution took place, the people of each state became themselves sovereign..."); *Shively v. Bowlby* 152 U.S. 1, 14-15 (1894) ("And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States...").)

As independent sovereigns, the States established separate governments; adopted individual state constitutions; enacted criminal and civil statutes; imposed taxes and imposts; established and maintained courts; and succeeded to all other incidents and prerogatives of the sovereignty previously enjoyed by the Crown in North America,[2] including ownership of all vacant and unappropriated land within their borders. *Id.* Included in those lands were the territorial waters and tidelands. *United States* v. *California,* 332 U. S. 19 (1947)

The adoption of the Constitution did not change that paradigm. The sovereignty of the states was fully preserved and has been recognized by the United States Supreme Court in decision after decision. We will explore this concept in more detail hereinbelow. For present purposes, however, suffice it to say that state sovereignty and the prerogatives that flow from it is a value of Constitutional moment and will not lightly be disregarded.

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[1] "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."

[2] (See, Curtis, *History of the Origin, Formation, and Adoption of the Constitution of the United States*, Harper Bros., 1860; Vol.1, page 38)

THE EQUAL SOVEREIGNTY PRINCIPLE

As we have observed, on independence from England, the original thirteen colonies became sovereign nations. The extent of that nationhood can be measured by the fact that some states imposed tariffs on others; that some states exchanged ambassadors and that all formed their own armies and, some, their own navies.[3] That status as independent nations must inform any understanding of the creation of a national compact among the states that created a nascent national body to which the states delegated certain, discrete powers. But the Articles of Confederation that accomplished this specifically and by its terms preserved state independence. That status is recognized in the very name of our nation: The "United States" of America; a league of sovereign nations united by a single compact.

A league of any sort necessarily has members and those members must necessarily be equal under the rules of the league. So it is that each new state that was added to the league after the Founding was admitted on an equal footing to all of its predecessor sister states. The seminal case articulating this principle, the Equal Footing Doctrine, is *Pollard v. Hagen* 44 U.S. 212 (1945). In that case, the Supreme Court found that when Alabama achieved statehood, it succeeded to all incidents of sovereignty within its borders previously belonging to the United States because new States must be admitted on an equal footing with the original States in all respects whatever. *Id.* at 222 ("And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its

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[3] Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM.HIST.REV. 529 (1906–07)

delegates into the congress of the United States, on an equal footing with the original states in all respects whatever"), and at 223 ("When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession . . .").

All of the Equal Footing cases emphasize the sovereignty of the States and that the "footing" on which they are equal to the original States, is in the forms, rights and incidents of sovereignty to which the original States succeeded from the Crown on independence.

> "No principle is more familiar than this, that whilst a state has granted a portion of its sovereign power to the United States, it remains in the enjoyment of all the sovereignty which it has not voluntarily parted with . . . In the Constitution, what power is given to the United States over the subject we are now discussing? In a territory they are sovereign, but when a state is erected a change occurs. A new sovereign comes in."
> *Id.*, at 215

The same issue arose in *Shively v.* Bowlby, 152 U.S. 1 (1892). Shively claimed ownership of land on the basis of a grant by the United States and Bowlby claimed through Oregon. The Court found for Bowlby on the basis of the retained sovereignty of the State and its admission to the Union on an equal footing with the original States that succeeded to the Crown's sovereign rights in land below the high water mark. The Court wrote:

> "Clearly, congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign, independent state, or indispensable to her equality with her sister States, necessarily implied and guaranteed by the very

nature of the Federal compact." *Shively*. at 152 U.S. at 34; 14 S.Ct. at 560

Accordingly, when the State of California was admitted to the Union in 1850, it succeeded to all of the sovereign powers enjoyed by the original thirteen states and the sister states that preceded her, including ownership in the tidelands and territorial waters along its coast.

THE STATES RETAIN MUNCIPAL SOVEREIGNTY

So, what are the incidents of sovereignty to which California succeeded on statehood?

Sovereignty, in the conduct of collective human activity, is the right of a people or a government to conduct its internal affairs in accordance with its discrete rulemaking mechanisms. The "sovereign", whether a nation-state or one of the United States, has the power to: make laws for the governance of a people; impose taxes; enforce laws; enter into agreements and treaties with other sovereign peoples and states; conduct national trade; raise armies and navies; act on behalf of the state in relation to other sovereigns; conduct national and internal defense for the protection of the state and its people; and, acquire, own and dispose of land in the name of the sovereign by right of purchase, conquest or discovery. *Johnson and Graham's Lessee v. M'Intosh* 21 U.S. 543, 595-596 (1823)[4]; All of those powers inhered in the original thirteen states until specific powers, such as the conduct

[4] *See, also, Biersteker, Thomas; Weber, Cynthia (1996). State Sovereignty as Social Construct. Cambridge Studies in International Relations 46. Cambridge University Press; Blackstone's Commentaries, Book 1, Chapter 7; Commentaries On the Constitutions and Laws, Peoples and History, of the United States: And Upon the Great Rebellion and Its Causes*; Ezra Champion Seaman, Ann Arbor, 1863; page 173.

of foreign relations and the raising of armies and navies, were delegated to the national government.

From the earliest days of the Republic, it has been recognized that the states are the primary seat of sovereignty and retain that sovereignty after statehood. In *Pollard v. Hagan* 44 U. S. (3 How) 211, 223, the Supreme Court wrote:

> "And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere except in cases in which it is expressly granted."

To understand the Court's meaning, one must understand an ancient concept little used in modern days and that is the notion of "municipal sovereignty". The Court defined that concept eight years before it decided *Pollard* in *New York v. Miln* 36 U.S. (11 Pet.) 102, 139 (1837) In that case the court wrote of "municipal sovereignty":

> "We choose rather to plant ourselves on what we consider impregnable positions. They are these:
>
> That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right but the bounden and solemn duty of a state to advance the safety, happiness, and prosperity of its people and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may

> perhaps more properly be called internal police, are not thus surrendered or restrained, and that consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."

An early treatise on the subject explains the significance of the distinction:

> The distinction between national sovereignty and municipal sovereignty is not an arbitrary one but naturally arises out of the nature of government and has often been recognized by the United States supreme court as a distinction which marks the boundary line between federal and state power.[5]

As *Pollard* recognizes, the states retain plenary power and sovereignty over the land within their borders that is privately owned or owned by the state itself and has exclusive police power with respect to it.

The *Pollard* Court went on to write:

> "We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new States were formed."
> *Pollard*, at 221.

And, further, at page 223, the Court wrote:

> "[B]ecause, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted."

Finally, at pages 228-229, the *Pollard* Court concluded:

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[5] *Federal Procedure at Law: A Treatise on the Procedure on Suits at Common Law*; Vol. 1 by C.L. Bates, T.H. Flood & Co., 1908, page 148; § 181.

> "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law,"

In *Fort Leavenworth R. Co. v. Lowe* 114 U.S. 525, 531, 5 S.Ct. 995 (1885), the Supreme Court carefully explained the limits of federal power in land within state borders:

> "The consent of the states to the purchase of lands within them for the special purposes named, is, however, essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of a private individual."

THE STATE OF CALIFORNIA RETAINS POLICE POWERS OVER ALL LAND WITHIN ITS BORDERS THAT IT OWNS OR IS PRIVATELY OWNED.

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012), Chief Justice Roberts recently explained the rationale for the retention of police powers by the several states:

> "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York* v. *United States*, 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties,

> and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond* v. *United States*, 564 U.S. ___, ___, 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269, 280 (2011).

Justice Roberts went on to explain what police powers are retained by the states and denied to the federal government. In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) he wrote:

> Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist No. 84, p. 515 (C. Rossiter ed. 1961). And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The Federal government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, *e.g., United States* v. *Comstock*, 560 U.S. 126, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010).
>
> The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments--as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government--punishing street crime, running public schools, and zoning

property for development, to name but a few--even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal government, as the "police power." See, *e.g., United States* v. *Morrison*, 529 U.S. 598, 618-619, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012).

THE CITY OF SAN DIEGO OWNS THE LAND AT ISSUE HEREIN BY GRANT FROM THE STATE OF CALIFORNIA.

What territory, then, is encompassed by California's municipal sovereignty and its exclusive rights of jurisdiction, ownership and management? When California entered the Union it retained ownership of all land under navigable waters, both onshore and off. Again, *Pollard v. Hagen*, supra, is dispositive. In that case, the plaintiff sought judgment that he was the rightful owner of land previously below the high water mark on Mobile Bay in Alabama by reason of a patent issued to him by the United States government. The Court held that the United States held no such title, title having passed upon statehood to Alabama, which had the sole right of disposition. The Court found that when Alabama achieved statehood, it succeeded to all incidents of sovereignty within its borders previously belonging to the United States because new States must be admitted on an equal footing with the original States in all respects whatever. *Id.* at 222.[6] That includes ownership of the tidelands in coastal states like California.

[6] "And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates into the congress of the United States, on an equal

This was confirmed more recently in *Utah Division of State Lands v. United States* 482 U.S. 193 (1987), in which the Court decided that, under the Equal Footing Doctrine, the bed of Utah Lake transferred to the State of Utah upon statehood; this after nearly a century during which virtually everyone – certainly the federal government – assumed ownership to be in the United States because of vague wording in a 1888 Act that reserved certain lands to the United States.

The language in *Utah Division of State Lands* is instructive. The Court begins its opinion by exploring the origins of the Equal Footing Doctrine, instructing that at the time of the American Revolution, certain lands belonged to the sovereign under English common law as a matter of sovereign right and were retained and managed for certain sovereign purposes. When the original States declared their independence, they became sovereign successors to the English Crown and legitimately laid claim to those lands. Because those lands were inherited by the original States by sovereign succession, all new States must, correspondingly, succeed to ownership of similar lands within their borders on statehood, under the Equal Footing Doctrine. The Court stated:

> The equal footing doctrine is deeply rooted in history, and the proper application of the doctrine requires an understanding of its origins. Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing, and other

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footing with the original states in all respects whatever", and 223 "When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession . . .".

> commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. See *Shively* v. *Bowlby*, 152 U.S. 1, 11-14 (1894). When the 13 Colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown *Id.*, at 15. Because all subsequently admitted States enter the Union on an "equal footing" with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union. *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845).[7]

The sources of California's rights were explored by the Supreme Court in *Martin v. Waddell.* 41 U.S. (16 Pet.) 367, 426 (1842). The Court wrote:

> "In the case of *Johnson v. McIntosh,* 8 Wheat. 595, this Court said that according to the theory of the British constitution, all vacant lands are vested in the Crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the Crown as a branch of the royal prerogative. And this principle is as fully recognized in America as in Great Britain; all the lands we hold were originally granted by the Crown; our whole country has been granted, and the grants purport to convey the soil as well as the right of dominion to the grantee. Here the absolute ownership is recognized as being in the Crown, and to be granted by the Crown, as the source of all title, and this extends as well to land covered by water as to the dry land; otherwise no title could be acquired to land under water."[8]

Martin was preceded by *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839), in which the Court wrote: "..the ultimate fee...was in the

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[7] 482 U.S. 193, 195 (1987)
[8] *Id.* at 426.

Crown previous to the Revolution, and in the States of the Union afterwards."

In the mid-Twentieth Century, the matter of ownership of land off shore became one of some controversy as state governments found that valuable resources were available for extraction in those lands. The Supreme Court was asked, again, to decide the extent of state ownership of such lands as Texas claimed ownership well into the sea and beyond what had traditionally been recognized as the extent of state sovereignty. In 1950, the Supreme Court decided *United States v. Texas,* 339 U.S. 707 (1950) and, while recognizing the rights of the states to ownership of the land shoreward of the low water mark, found that on statehood on an equal footing with its sister states, Texas ceded its rights beyond three miles of the low water mark.

This became a political issue and the development of law thereafter is set forth in detail by Justice O'Connor in *United States v. Alaska* 521 U.S. 1 (1997):

> Several general principles govern our analysis of the parties' claims. Ownership of submerged lands-which carries with it the power to control navigation, fishing, and other public uses of water-is an essential attribute of sovereignty. *Utah Div. of State Lands* v. *United States,* 482 U. S. 193, 195 (1987). Under the doctrine of *Lessee of Pollard* v. *Hagan, 3* How. 212, 228-229 (1845), new States are admitted to the Union on an "equal footing" with the original 13 Colonies and succeed to the United States' title to the beds of navigable waters within their boundaries. Although the United States has the power to divest a future State of its equal footing title to submerged lands, we do not "lightly infer" such action. *Utah Div. of State Lands, supra,* at 197.

In *United States* v. *California,* 332 U. S. 19 (1947) *(California* 1), we distinguished between submerged lands located shoreward of the low-water line along the State's coast and submerged lands located seaward of that line. Only lands shoreward of the low-water line-that is, the periodically submerged tidelands and inland navigable waters-pass to a State under the equal footing doctrine. The original 13 Colonies had no right to lands seaward of the coastline, and newly created States therefore cannot claim them on an equal footing rationale. *Id.,* at 30-33. Accordingly, the United States has paramount sovereign rights in submerged lands seaward of the low-water line. *Id.,* at 33-36. In 1953, following the *California I* decision, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.* That Act "confirmed" and "established" States' title to and interest in "lands beneath navigable waters within the boundaries of the respective States." § 1311(a). The Act defines "lands beneath navigable waters" to include both lands that would ordinarily pass to a State under the equal footing doctrine and lands over which the United States has paramount sovereign rights, beneath a 3-mile belt of the territorial sea. § 1301(a). The Act essentially confirms States' equal footing rights to tidelands and submerged lands beneath inland navigable waters; it also establishes States' title to submerged lands beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States. *California ex rel. State Lands Comm'n* v. *United States,* 457 U. S. 273, 283 (1982). The Alaska Statehood Act expressly provides that the Submerged Lands Act applies to Alaska. Pub. L. 85-508, § 6(m), 72 Stat. 343 (1958). As a general matter, then, Alaska is entitled under both the equal footing doctrine and the Submerged Lands Act to submerged lands beneath tidal and inland navigable waters, and under the Submerged Lands Act alone to submerged lands extending three miles seaward of its coastline.

What these cases make very clear, then, is that California succeeded to sole ownership of the land at issue herein and had the power to transfer it. It did so, as all parties concede, in a tidelands

trust, to the City of San Diego that now retains – together with California – sole discretion over its management and use.

This concept is central to the trial court's error herein. The court wrongly assumed that the federal government has the power to control and manage land that inarguably belongs to the City of San Diego. But that is not correct. That management and control falls exclusively to the State of California which retains exclusive sovereignty over non-federal land within its borders and to its political subdivision, the City of San Diego, which owns the land. The federal government has no right of ownership, management or control of that land unless granted it by the State of California. *Fort Leavenworth R. Co. v. Lowe* 114 U.S. 525, 531, 5 S.Ct. 995 (1885) There has been no such grant herein.

The trial court's fundamental ruling was that the City of San Diego has the power to manage its own property "*only* if the Secretary [of the Interior or Commerce] had previously granted full authority to City and/or Commission to manage the subject property" [*emphasis supplied*] (*Statement of Decision*, page 15 lines 1 -6). But, as we have seen, the federal government has no such police power or municipal sovereignty over lands that do not belong to it and cannot exercise same without the consent of the State; consent which the State has not granted. (*Id.*)

It is noteworthy that the court below cited no authority for this proposition. That is because the proposition is not correct as a matter of Constitutional law.

THE CITY OF SAN DIEGO HAS EXCLUSIVE AND COMPLETE DISCRETION TO EXCLUDE TRAFFIC FROM LAND IT OWNS.

Cities and counties in the State of California have the right to make and enforce regulations within their limits pursuant to a grant thereof by the California Constitution Article XI, § 7. Although the exercise of the police power must be confined to local regulations and is subject to the general laws of the State of California, it is otherwise as broad as that of the Legislature. *In re Maas* (1933) 219 Cal. 422, 424; *Birkenfeld v. Berkeley* (1976) 17 Cal.3d 129, 140.

Among the proper subjects of local regulation are use of the land, *Great Western Shows v. Los Angeles* (2002) 27 Cal.4th 853, 873 and use of the public streets. *Loska v. Superior Court* (1986) 188 Cal.App.3d 569, 579. This exclusive power includes the right to exclude entry to property owned by the City. *Higgins v. Santa Monica* (1964) 62 Cal.2d 24, 28. See, also *Alioto's Fish Co. v. Human Rights Commission of San Francisco* (1981) 120 Cal.App.3d 594, 604.

In *Higgins*, after recounting the grant of tidelands by the State of California to Santa Monica, in trust, for certain purposes, the Supreme Court held that Santa Monica therefore had discretion to manage and operate its land in a manner of its exclusive choosing, including the right to prohibit entry and the conduct of certain activities on its land. In doing so, the Court held that Santa Monica's discretion was extremely extensive and subject only to an abuse of discretion standard. The Court held that Santa Monica had the power

to exclude, to manage and to determine, in its discretion, what sort of activities it would allow to occur on its land.

The *Higgins* case is one to which this Court should pay particular attention because its fact pattern closely tracks that of the instant case. The tidelands at issue in that case belonged to the State of California which transferred them to the City of Santa Monica for certain purposes. The State later amended the purposes for which the grant was made – primarily commercial purposes – to include the possibility of recreational purposes for the general public. Through a citizen initiative, Santa Monica prohibited exploration for oil on the tidelands and the Court found that Santa Monica had the discretion to decide who could enter its property; what they could do on its property and who it could exclude from its property. The Court held that unless Santa Monica adopted an ordinance that was transparently contrary to the purposes for which the State made its grant, as amended, it was otherwise free to legislate as it wished and to constitutionally exercise its discretion and its ability to exclude with respect to its property.

The Court also found that Santa Monica's exercise of discretion was not preempted by State law. In doing so the Court wrote:

> Furthermore, section 6305 of the Public Resources Code confers "upon the counties and cities to which such [tide] lands have been granted" all the leasing powers granted to the State Lands Commission. All the state's oil-leasing powers are vested in, and exercisable by, that commission. (Pub. Resources Code, §§ 6102, 6216, 6301, 6501.1.) It follows that all such powers in respect to the tidelands granted to Santa Monica are now vested in that city.

Clearly, San Diego has and retains discretion to manage its own assets as it deems proper, in its sole discretion. It needs no permission from the federal government to do so.

In *Alioto*, the court recognized San Francisco's right to enforce provisions of its lease of municipal land to a restauranteur. The premise of the case was that San Francisco had the power to lease its land and, hence, to exclude those who were *not* subject to the lease, and to enforce covenants within the lease that were conditions of the lessee's continued occupancy.

In sum, the federal government has no power or authority over the use of State or City land. In the instant case, then, the State and City retain municipal sovereignty over their land, including the land at issue herein. San Diego's ordinance excluding the general public from its land for periods of time in accordance with its exercise of legitimate legal authority and plenary power is proper under the law and the court below erred in finding that it was required to obtain federal permission to do so.

SAN DIEGO'S EXERCISE OF PLENARY AUTHORITY OVER MANAGEMENT AND OCCUPATION OF ITS LAND IS NOT PREEMPTED BY FEDERAL LAW.

The trial court provided no guidance with respect to the authority upon which it relied in deciding that San Diego's ordinance was preempted by federal law. However, we must start by observing what it is that the Federal Marine Mammals Protection Act was intended to accomplish. 13 U.S.C. 1362 Section 2 sets forth the findings and purposes of the statutory scheme. It is to protect and conserve current populations of marine mammals, including harbor

seals, from "taking", which includes, among other things, "killing", "harassing" and "molesting" those subject to the protection of the Act. It also provides for the replenishment, enhancement and increase of such populations. The section goes on to read:

> "...it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat."

That overarching purpose must inform any pre-emption analysis because the fundamental notion underlying pre-emption is that state and municipal law must not interfere with legitimate federal goals based on legitimate delegated federal powers. Among those delegated powers, we hasten to emphasize, is *not* the power to seize or manage state or municipal property which the federal government is constitutionally prohibited from doing.

1. **Source of Federal Preemption**.

When Congress exercises a granted power, affected persons may challenge concurrent conflicting state legislation using the "Preemption Doctrine". The "Supremacy Clause", United States Constitution, Article VI, cl. 2, mandates that federal law overrides, i.e., "*preempts*", any state regulation where there is an actual conflict between the two sets of legislation such that both cannot stand. *S.J. Groves &Sons Co. v. Fulton County* (1991) 920 F.2d 752, 763; Rotunda & Nowak, *Treatise on Constitutional Law,* 5th Edition, Vol. 2, § 12.1; page 300.

Note, however, that the first prerequisite for invoking the Preemption Doctrine is that the power the federal government purports to exercise must legitimately be granted to it. As we have seen, state sovereignty and the prerogatives and police powers that accompany it, are critical national values preceding the Founding; constitute the very basis for our federal system and are consistently Constitutionally protected. (See *Alden v. Maine* 52 U.S. 706 (1999); *Shelby County v. Holder* 133 S.Ct. 2612 (2013). Accordingly, the ordinance at issue herein cannot be preempted on the basis of a federal right to manage and control the land to which the ordinance is directed because the federal government does not have the legitimate delegated power to do so.

In *Alden v. Maine*, 527 U.S. 706 (1999) the Supreme Court upheld, on the basis of the equality of the States, the right of States to the protection of sovereign immunity, even as against claims under federal law. In that case, police officers in Maine sued the state in federal court for violation of the Federal Fair Labor Standard Act of 1938. The Court affirmed dismissal on the basis that Maine had not consented to suit and was entitled to the protection of sovereign immunity as an incident of its status as a sovereign State. The Court wrote:

> "Although the Constitution establishes a National government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." *Seminole Tribe of Fla. v. Florida, supra*, at 71, n. 15; accord, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991) ("The States entered the federal system with their sovereignty intact"). Various textual provisions of the

Constitution assume the States' continued existence and active participation in the fundamental processes of governance. See *Printz v. United States*, 521 U.S. 898, 919, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997) (citing Art. III, § 2; Art. IV, §§ 2-4; Art. V). The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National government, moreover, underscore the vital role reserved to the States by the constitutional design, see, e.g., Art. I, § 8; Art. II, §§ 2-3; Art. III, § 2. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10; see also *Printz, supra*, at 919; *New York v. United States*, 505 U.S. 144, 156-159, 177, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992).

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison).

Second, even as to matters within the competence of the National government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal governments would exercise concurrent authority over the people -- who were, in Hamilton's words, 'the only proper objects of government.'" *Printz, supra*, 521 U.S. at 919-920 (quoting The Federalist No. 15, at 109); accord, *New York, supra*, at 166 ("The Framers explicitly chose a Constitution that confers upon

> Congress the power to regulate individuals, not States"). In this the founders achieved a deliberate departure from the Articles of Confederation: Experience under the Articles had "exploded on all hands" the "practicality of making laws, with coercive sanctions, for the States as political bodies." 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911) (J. Madison); accord, The Federalist No. 20, at 138 (J. Madison & A. Hamilton); James Iredell: Some Objections to the Constitution Answered, reprinted in 3 Annals of America 249 (1976)"[9]

Just two years ago, the Supreme Court again reaffirmed the power and continuing vitality of the Equal Sovereignty Principle in *Shelby County v. Holder* 133 S.Ct. 2612 (2013). In deciding that the preclearance requirement of the Voting Rights Act was unconstitutional, the Court wrote:

> Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. *Northwest Austin*, *supra*, at 203, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (citing *United States* v. *Louisiana*, 363 U.S. 1, 16, 80 S. Ct. 961, 4 L. Ed. 2d 1025 (1960); *Lessee of Pollard* v. *Hagan*, 44 U.S. 212, 3 How. 212, 223, 11 L. Ed. 565 (1845); and *Texas* v. *White*, 74 U.S. 700, 7 Wall. 700, 725-726, 19 L. Ed. 227 (1869); emphasis added). Over a hundred years ago, this Court explained that our Nation "was and is a union of States, equal in power, dignity and authority." *Coyle* v. *Smith*, 221 U.S. 559, 567, 31 S. Ct. 688, 55 L. Ed. 853 (1911). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id.*, at 580, 31 S. Ct. 688, 55 L. Ed. 853. *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context. 383 U.S. at 328-329, 86 S. Ct. 803, 15 L. Ed. 2d 769. At the same time, as we made clear in *Northwest Austin*, the fundamental

[9] *Id.* at 713-715

principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States." *Id.* at 2623-2624.

In light of the vital Constitutional presumption of state sovereignty, then, pre-emption is not lightly to be found. *Chamber of Commerce of the United States v. Whiting* 563 U.S. 582, 607 (2011) ("Our precedents "establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act.") Indeed, the Supreme Court has, in recent years, imposed a presumption *against* preemption. *New York State Dept. of Social Services v. Dublino* 413 U.S. 405, 413 (1973) ("If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *Schwartz* v. *Texas*, 344 U.S. 199, 202-203 (1952).)

Bolstering the Court's clear deference to Constitutional state prerogatives, in *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 502 (1985), the court held that even if a court were to determine that federal law preempts state law, is must displace state law only to the extent is *actually conflicts* with federal law. (See, also, *Dalton v. Little Rock Family Planning Services* 516 U.S. 474 (1996))

2. **Basic Test For Preemption**.

The Court formulated analytical standards for preemption in the early cases of *Hines v. Davidowitz* 312 U.S. 52 (1941) and *Pennsylvania v. Nelson* 350 U.S. 497 (1956). In *Hines*, the Court held

that when Congress fully occupies a field of law *in which it has jurisdiction to act and state law conflicts with the purpose of a federal statute,* state law must be preempted. *Hines* at 62-62. In *Pennsylvania v. Nelson*, the Court articulated a three prong test for preemption: 1.) whether the federal regulatory scheme was so pervasive as to fully occupy the area and preclude additional legislation; (2) whether the field required national uniformity, and (3) the extent of danger of conflict between state laws and the administration of the federal program. *Nelson* at 502-503.

In *Silkwood v. Kerr-Mcgee Corp.* 464 U.S. 238 (1984), the Court set forth, in simple terms, its basic approach to pre-emption:

> 'As we recently observed in *Pacific Gas & Electric Co.* v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190 (1983), state law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. *Id.*, at 203-204; *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U.S. 141, 153 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc.* v. Paul, 373 U.S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67 (1941)."

In *Silkwood*, Kerr-Mcgee argued that Oklahoma was prohibited from allowing for the imposition of punitive damages on the operator of a nuclear power facility because the federal government had, by the stated terms of its statutory scheme, asserted exclusive regulatory

authority over nuclear power plants. The Court disagreed. It found that while the federal government did, in fact, have *stated* exclusive regulatory authority over nuclear facilities, that did not preclude Oklahoma from allowing the imposition of punitive damages on claims arising from injuries suffered by its citizens at the hands of the operators of such facilities. The federal government occupied the field of nuclear regulation, but not the field of damages arising from the management of nuclear facilities.

Likewise, herein, the federal government has occupied the field of marine mammal protection, but not the field of the management land where marine mammals might rest. The Marine Mammals Protection Act simply does not and cannot have preemptive impact on the exercise of discretionary City land management.

3. **State Sovereignty and Federal Power**.

As we have seen, preemption can occur only if Congress acts in an area in which it has the delegated authority to do so. *New York State Dept. of Social Services v. Dublino* 413 U.S. 405, 413 (1973); *Schwartz* v. *Texas*, 344 U.S. 199, 202-203 (1952). Accordingly, if Congress has no authority to act in an area of law, its enactment cannot have preemptive impact. *Id.* What has the City of San Diego done in this instance? It has exercised its plenary and exclusive authority to manage land it owns. Its ordinance is directed to one object and one object only: the closure of land it owns and the exclusion of human traffic during a defined, discrete time of year. What prompted the City's decision to enact the ordinance at issue herein is wholly irrelevant, just as California's Supreme Court found in *Higgins v. Santa Monica* (1964) 62 Cal.2d 24. If it was within its

authority to act, it is permissible and cannot be overturned, absent an abuse of discretion.

The result might be different, if the City did not own the property in question and would unquestionably be different if the federal government did so. But, as we have seen, not only does the federal government not own the land in question, it has no authority over the land in question because that land was ceded to California's exclusive ownership on statehood as a matter of Constitutional law. That grant was reaffirmed in the *Federal Submerged Lands Act*, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.* The federal government has no power delegated to it under the Constitution of the United States to manage, control or make rules regarding land it does not own and that is owned by a municipality through the state in which it rests. *United States* v. *California,* 332 U. S. 19 (1947); *Fort Leavenworth R. Co. v. Lowe* 114 U.S. 525, 531, 5 S.Ct. 995 (1885); *Shively v.* Bowlby, 152 U.S. 1 (1892). The federal government certainly has no jurisdiction or the power to exclude or to order the State or City to allow access to land belonging to the City.

This is an issue of Constitutional moment and the right to own and manage the land in question rests only and solely with the City and State, to the exclusion of the federal government.

4. **Federal Purposes in the Marine Mammals Protection Act.**

Congress very carefully defined the purposes for which it adopted the *Marine Mammals Protection Act* at 13 U.S.C. 1362 ("Act") Section 2, quoted extensively hereinabove. Conspicuously absent from the provisions of the Act is any reference to the management of lands belonging to coastal states or municipalities. In

fact, the Act makes specific reference to the lands that *are* within the jurisdiction of the United States and subject to the Act at Section 3, Article 15 of the Act:

> (15) The term "waters under the jurisdiction of the United States" means— (A) the territorial sea of the United States; (B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the other boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured;

The "territorial sea of the United States" is defined in the 1982 United Nations Convention on the Law of the Sea and it begins at the "low water mark" of any coastal state and extends twelve miles into the ocean. Reference to the "seaward boundary" in the Act means that its jurisdiction begins *after* the tidelands – *seaward* of the low water mark – that Constitutionally specifically belong either to the State of California or, in this instance, to the City of San Diego. In other words, the Act itself limits federal jurisdiction to land beyond the low water mark and, by exclusion, specifically precludes its jurisdiction over the land at issue herein.

As we have seen, as well, under the *Federal Submerged Lands Act*, supra, the land under the coastal strips of the United States belong exclusively to the several coastal states for a distance of three miles.

What is clear from the Act is that the statutory scheme represented by the Marine Mammals Protection Act on which the court below based its decision, is not directed toward the land management of tidelands - the *landward* side of the low water mark – that belong to the City, in this instance. So, the Act cannot preempt

San Diego's discretionary management of its own land because the Act itself is not directed toward that management and makes no reference to it.

The Act is solely directed to the preservation, protection and increase in population of marine mammals and not the land on which they may come to rest.

5. **The City's Ordinance Does Not Conflict With Federal Law.**

The second error made by the court below, therefore, was in finding that the Marine Mammals Protection Act, by its terms, preempted land management authority legitimately – *and Constitutionally* – belonging to the City of San Diego. It does not.

The Act's clear purpose is to protect marine mammal populations and, on that score, it would have preemptive force if the City or the State were to have enacted ordinances or statutes purporting to regulate the taking of marine mammals that conflicted in some way with the Act.

So, while San Diego's ordinance refers to harbor seals, its object is not directed to their taking but, rather, to the City's exclusive right to manage its own land and to exclude the public from land it inarguably owns. There is no conflict between the ordinance and the Marine Mammals Protection Act. Both can simultaneously be obeyed.

It is possible, even, probable, that the City's ordinance retards the harassment and molestation of the harbor seals that rest on its property to give birth. But precluding human traffic from its proprietary land is within the City's sole municipal discretion. Perhaps it advances the federal purposes set forth in the Act by preventing people from entering the land and "taking", in the broad

sense, the seals. But that is not the same as offering a regulation that purports to act in an area of exclusive federal jurisdiction. And the ordinance, standing alone, does nothing to interfere with the federal scheme, as it must to be subject to preemption under *S.J. Groves &Sons Co. v. Fulton County* (1991) 920 F.2d 752, 763; *Silkwood v. Kerr-Mcgee Corp.* 464 U.S. 238 (1984); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963) and *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 502 (1985).

Indeed, there is a sound argument to be made that the City's *failure* to enact the ordinance it has would interfere with the federal purposes of the Act by encouraging, aiding and abetting the "taking" of marine mammals by members of the public. Certainly, the harassment or molestation of the seals by human beings is entirely predictable, inasmuch as it has demonstrably occurred. Failure to act can be as blameworthy as acting recklessly, when the harm can reasonably be anticipated. Perhaps the reason the federal government did not request that San Diego enact such an ordinance is that, as we have seen, it has neither the power nor the jurisdiction to compel the City or State to take any action with respect to land that belongs to the City and over which it and the State have exclusive control, jurisdiction and authority. It is also significant that the federal government has not sought to intervene in this case. If it felts its interests were in jeopardy or its exclusive authority challenged because of the ordinance at issue herein, surely it would have done so.

6. **It Is Possible To Comply Both With the Act and With the Ordinance.**

We underscore that in order for federal law to have a preemptive impact on state or local law, complying with both must not be possible. *Florida Lime & Avocado Growers, Inc. v. Paul* 373 U.S. 132, 142-143. In the instant matter, it is entirely possible for both statutory schemes to coexist without impingement on one another. On the one hand, the Act does not purport to regulate land, only the taking of marine mammals. To the extent land is mentioned in the Act, it is land beyond the boundary of the land at issue herein. On the other hand, the ordinance simply purports to manage municipal land by excluding human traffic from a parcel of the City's land for a portion of each year; something coastal municipalities regularly do when beaches become dangerously polluted. The exclusion of human traffic from City-owned land does not conflict either with the goals or purposes of the Act. The Act does not purport to manage land or to preclude municipalities from regulating land under their ownership or jurisdiction. The two legislative schemes address completely different areas of exclusive jurisdiction. They simply do not conflict.

Both governmental entities and the general public can entirely comply with the law of each without conflict or impingement on the prerogatives of the other. Accordingly, the Act simply does not, in any way, preempt the City's ordinance with its exclusion of human traffic from its own land.

CONCLUSION

The decision of the court below was unusual on many levels. It was based, first, on the unconstitutional assumption that the City requires federal permission to close its beaches. It does not. It holds, without authority, that discretionary land management is preempted by an Act that does not address management of the category of land at issue herein. It takes the position that the City's wholly discretionary action that has the effect of precluding human traffic from its land at a time during which seals are giving birth and nurturing their young on that land constitutes an interference with the goals of an Act the purpose of which is to protect those seals and prevent their "taking"; including their harassment and molestation.

The court was wrong on all scores. California, and, through it, San Diego, have exclusive plenary authority over the land in question, as a matter of Constitutional law. The federal government has neither the power nor the jurisdiction to invade that constitutionally protected authority. The Act does not occupy the field of municipal land management or the management of municipal assets, the exclusive purview of the City of San Diego and the State of California. The ordinance interferes with none of the Act's stated goals.

It is possible to obey both bodies of law and preemption is disfavored and, in fact, unavailable, when that is true.

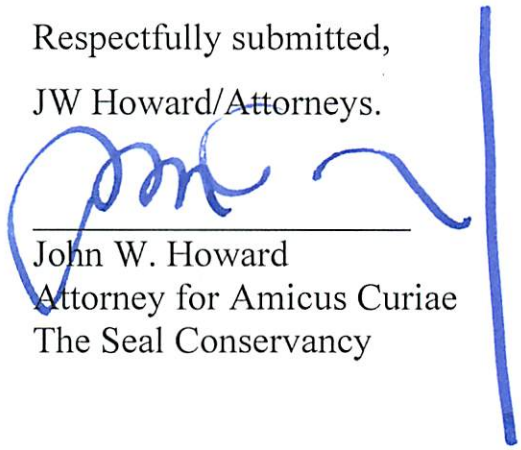
For all of these reasons, the Seal Conservancy urges this Court to reverse the court below and remand this case with directions to

vacate its order and overrule the Respondent's petition.

Dated: January 11, 2017

Respectfully submitted,

JW Howard/Attorneys.



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The Seal Conservancy

CERTIFICATE OF WORD COUNT

I certify that the foregoing brief complies with the California Rules of Court, and contains 9,681 (nine thousand six hundred eighty-one) words according to the word count feature of Microsoft Word, the computer program used to prepare the brief.

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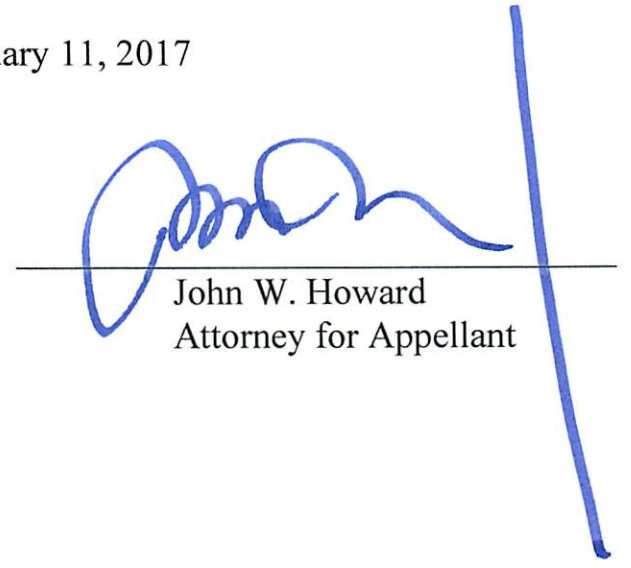

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         (c) Person served:

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