Case Nos. G053709/G053725

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

FRIENDS OF THE CHILDREN'S POOL
Plaintiff and Respondent

v.

CITY OF SAN DIEGO and CALIFORNIA COASTAL COMMISSION
Defendants and Appellants

APPEAL FROM THE ORANGE COUNTY SUPERIOR COURT
HON. FREDERICK HORN, JUDGE
CASE NO. 30-2015-00778153-CU-WM-CJC

PLAINTIFF AND RESPONDENT FRIENDS OF THE CHILDREN'S POOL'S RESPONSE TO THE AMICUS CURIAE BRIEF FILED BY THE SEAL CONSERVANCY

Bernard F. King III (Bar No. 232518)
Law Offices of Bernard F. King III
1455 Frazee Road, Suite 500
San Diego, California 92108
Phone: (858) 746-0862
Fax: (858) 746-4045
Email: bking@bernardkinglaw.com

Attorney for Plaintiff and Respondent
FRIENDS OF THE CHILDREN'S POOL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

FEDERAL STATUTES

STATE STATUTES

CONSTITUTIONAL PROVISIONS

OTHER SOURCES

Plaintiff and Respondent Friends of the Children's Pool ("FOCP") submits this response to the amicus curiae brief of the Seal Conservancy in support of appellant City of San Diego (the "City").

I. INTRODUCTION

Seal Conservancy's brief is a confusing, blunderbuss assault on the trial court's order finding the seasonal beach closure preempted by the Marine Mammal Protection Act ("MMPA"). It begins with grandiose claims that MMPA preemption does not apply because the City and the Commission are protected by some variation of state sovereign immunity. If Seal Conservancy is referring to Eleventh Amendment immunity from suit, its arguments necessarily fail because California statutes authorize mandamus actions to invalidate regulations preempted by federal law. If it is referring to substantive sovereign immunity, its arguments likewise fail because the MMPA is a proper exercise of Congressional power under the Commerce clause. These arguments reappear at various points in its brief, but the claims of immunity have no merit.

Seal Conservancy proceeds to argue that the City "owns" the Children's Pool Beach and retains "plenary" authority to enact the seasonal beach closure. To be clear, the City does not own a proprietary interest in

the Children's Pool. Instead, it holds the beach in trust for the benefit of the public and subject to the restrictions in the Legislature's grant. While the City does have authority to regulate activity at the Children's Pool, the seasonal beach closure is expressly preempted by 16 § U.S.C. 1379(a) of the MMPA because the ordinance "relates to" the taking, i.e. harassment, of harbor seals. Under the Supremacy Clause, MMPA preemption prevails over the City's beach closure.

Contrary to Seal Conservancy's assertions, the beach closure actually conflicts with many of the MMPA's objectives. It subverts the statutory process for transferring management authority to state entities and for securing federal approval of state regulations. This frustrates the goal of one national uniform policy, and hinders international agreements that require a single management authority for the United States. Furthermore, the regulation interferes with federal efforts to achieve the optimum sustainable population of harbor seals in La Jolla.

Finally, there is no merit to Seal Conservancy's claim the MMPA does not apply on state land or state territorial waters. Federal statutes presumptively apply within the United States, and in this case the MMPA makes it clear that it applies within the states. Accordingly, the arguments advanced in Seal Conservancy's brief provide no basis for overturning the decision of the trial court.

II. STATE SOVEREIGN IMMUNITY DOES NOT APPLY

Seal Conservancy makes numerous claims of state sovereign immunity, but its brief was unclear whether it was referencing Eleventh Amendment immunity from suit or sovereign immunity against federal law generally. In either case, its arguments are unavailing.

A. Eleventh Amendment Immunity from Suit Does Not Apply Because California Statutes Authorize Mandamus Actions to Stop Violations of Federal Law

Seal Conservancy cites *Alden v. Maine*, (1999) 527 U.S. 706, in support of its argument that state sovereign immunity prevents federal law from preempting the beach closure ordinance. (Amicus Brief, pp. 3, 22-23.) In *Alden*, the Supreme Court held that nonconsenting states were immune to state court actions for damages under the federal Fair Labor Standards Act ("FLSA"). Nothing in *Alden* makes the City and the Commission immune from a writ of mandate to enforce federal law.

To begin, FOCP's petition for writ of mandate does not seek damages, only prospective relief, i.e. an end to the preempted ordinance. (*Edelman v. Jordan* (1974) 415 U.S. 651, 663-664 [Eleventh amendment does not prohibit prospective relief]; *Ex parte Young* (1908) 209 U. S. 123, 159-160 [same].) Moreover, immunity from suit does not apply to municipalities like the City. (*Alden v. Maine, supra,* 527 U.S. at p. 756

["immunity does not extend to suits prosecuted against a municipal corporation"].)

Most importantly, however, "sovereign immunity bars suits only in the absence of consent." (*Alden v. Maine, supra,* 527 U.S. at p. 755 ["Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits.].), FOCP brought this action under the California statutes permitting writs of mandate. California courts have been clear that parties may bring a mandamus action to enforce state and local compliance with federal laws.

> Code of Civil Procedure section 1085 declares that a writ may be issued by any court ... to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station.... The availability of writ relief to compel a public agency to perform an act prescribed by law has long been recognized.

(*Mission Hospital Regional Medical Center v. Shewry* (2008) 168 Cal.App.4th 460, 478 [mandamus proper to enforce federal Medicaid laws] (internal quotations omitted); see Code Civ. Proc. § 1085; Code Civ. Proc. § 1094.5.)

By virtue of its mandamus statutes, California has consented to writ of mandate actions to invalidate ordinances and regulations preempted by federal law. (See e.g., *So. Cal. Ch. of Assoc. Builders v. California Apprenticeship Council* (1992) 4 Cal.4th 422 [writ of mandate granted where federal statute preempted state regulation]; *Zubarau v. City of*

Palmdale (2011) 192 Cal.App.4th 289, 305 [writ of mandate proper vehicle to determine whether federal law preempted city zoning ordinance]; *W.M. Barr & Co., Inc. v. South Coast Air Quality Management Dist.* (2012) 207 Cal.App.4th 406, 412 [writ of mandate alleging federal preemption of air quality regulation].) Because California allows writs of mandate to invalidate state laws preempted by federal statutes, neither the City nor the Commission is immune from FOCP's mandamus action.

B. State Sovereign Immunity Does Not Apply Because MMPA Preemption Is a Constitutional Exercise of Congressional Power Under the Commerce Clause

1. States Have No Sovereign Immunity from Legislation Enacted Within the Scope of Congress' Enumerated Powers

In *Garcia v. San Antonio Metropolitan Transit Authority*, (1985) 469 U.S. 528, the Supreme Court considered whether a state transit authority could assert state sovereign immunity in defense of an FLSA action for damages. The court overruled its prior precedent and rejected any "rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" (*Id.* at p. 546-547.) Instead of a creating a separate test for state immunity, the Supreme Court held that the scope of state sovereignty is defined by the Article I limitations on Congressional power and the political process. (*Id.* at p. 547-552.) Thus, because the FLSA was within the scope of Congressional power under the Commerce clause, the state could claim no immunity from

the regulation. (*Id.* at p. 554.) For the same reasons, Seal Conservancy's assertion of sovereign immunity fails because the MMPA was proper under Congressional Commerce clause powers.

2. MMPA Preemption Is a Constitutional Exercise of Congressional Power Under the Commerce Clause

The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." (U.S. Constitution, Art. I, § 8, cl. 3; *United States v. Lopez* (1995) 514 U.S. 549, 552-553.) The Supreme Court interprets that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." (*United States v. Morrison* (2000) 529 U.S. 598, 618-619.) (internal quotations omitted). "The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop." (*Nat. Fedn. of Indep. Business v. Sebelius* (2012) 132 S.Ct. 2566, 2578-2579.) (internal quotations and citations omitted) The reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for

carrying into Execution the foregoing Powers." (*Ibid*, quoting Art. I, § 8, cl. 18.) "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." (*Hodel v. Indiana* (1981) 452 U. S. 314, 323-324.; *Gonzales v. Raich* (2005) 545 U.S. 1, 22 ["In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."].)

Here, the MMPA regulates the taking, importation, possession and sale of marine mammals, and the MMPA preemption statute focuses on regulations relating to the taking of marine mammals. (16 U.S.C. § 1379(a).)

In enacting the MMPA, Congress specifically found that "marine mammals and marine mammal products either (A) move in interstate commerce, or (B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce, and that the protection and conservation of marine mammals and their habitats is therefore necessary to insure the continuing availability of those products which move in interstate commerce." (16 U.S.C. § 1361(5).) The relevant question is whether Congress had a rational

basis to find the taking of marine mammals, when considered in the aggregate, would substantially affect interstate commerce.

In *Gibbs v. Babbitt*, (4th Cir. 2000) 214 F. 3d 483, the court faced a similar Commerce clause challenge against federal regulations prohibiting the taking of red wolves. The Fourth Circuit Court of Appeals considered "whether the taking of red wolves on private land is in any sense of the phrase, economic activity."

> The relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts. We need not "pile inference upon inference," to reach this conclusion. While a beleaguered species may not presently have the economic impact of a large commercial enterprise, its eradication nonetheless would have a substantial effect on interstate commerce. …¶ Because the taking of red wolves can be seen as economic activity in the sense considered by *Lopez* and *Morrison*, the individual takings may be aggregated for the purpose of Commerce Clause analysis. While the taking of one red wolf on private land may not be "substantial," the takings of red wolves in the aggregate have a sufficient impact on interstate commerce to uphold this regulation.

(*Gibbs v. Babbitt, supra,* 214 F. 3d 483, 492-493.) (internal citations omitted)

The relationship between seal takings and interstate commerce is equally evident. Without seals, there will be no commercial trade in seal leather, no seal research, and no seal related tourism. Conversely, too many seals may also diminish other economic activity, e.g. tourism and seaside recreation, if an exploding population causes unpleasant odors and contaminated water. When considered in the aggregate, seal takings thus

have a substantial impact on interstate commerce. And as one purpose of the MMPA is to create a national, uniform system of marine mammal regulation, Congress acted properly in expressly preempting state efforts to regulate seal takings in the absence of a transfer of management authority over the seal population.

Seal Conservancy's claim the City had plenary power to regulate the Children's Pool must give way to federal legislation under Article 1. The MMPA's express preemption statute is proper under the Commerce clause, and thus does not unconstitutionally burden any aspect of state sovereignty.

III. THE ORDINANCE CONFLICTS WITH AND IS PREEMPTED BY THE MARINE MAMMAL PROTECTION ACT

A. As a Trustee of Public Tidelands, The City Has No Proprietary Interest in Children's Pool Beach

At numerous points in its brief, Seal Conservancy refers to Children's Pool Beach as "land [the City] owns," "land belonging to the City," "City-owned land," and "a parcel of the City's land." (See e.g. Amicus Brief, pp. 27-28, 32.) The argument is that federal preemption cannot apply because, according to Seal Conservancy, Children's Pool Beach is no different than a City-owned office building. This is incorrect.

The City does not own Children's Pool Beach. Rather, it holds the land in trust for the benefit of the public and under the terms set by the Legislature. (Stats. 1931, ch. 937, § 1, as amended by Stats. 2009, ch. 19.) Indeed, California law "forbids the creation of any proprietary interest in a

municipality in connection with a conveyance of tidelands." (*State of California ex rel. State Lands Com. v. County of Orange* (1982) 134 Cal.App.3d 20, 29; *City of Coronado v. San Diego Unified Port District* (1964) 227 Cal.App.2d 455, 479 [city had no proprietary interest in tidelands held under public trust].) Nor does the City have "plenary authority" over public trust lands. As trustee, the City's authority over Children's Pool Beach is limited by the terms of the Legislative Grant and subject to the State's right to revoke or modify the grant at any time. And under Public Resources Code section 6301, et seq, the State Lands Commission is vested with all residual jurisdiction and authority over tidelands which have, like the Children's Pool, been granted to another governmental subdivision. (*State of California ex rel. State Lands Com. v. County of Orange, supra,* 134 Cal.App.3d at p. 23.)

Despite Seal Conservancy's claims the City was simply "managing its own land," the beach closure ordinance bears no resemblance to proprietary actions of a private owner. The ordinance required public notice, multiple public hearings before the Planning Commission, multiple City Council votes, and ultimately the Mayor's approval. It further required an amendment to the Local Coastal Program, an application for a coastal development permit, and approval from the Commission. Moreover, as trustee of tidelands held in the public trust, the City did not manage Children's Pool Beach like an ordinary owner of private property. Rather,

the City enacted municipal laws regulating access to a public beach, for the express purpose of preventing seal harassment. Because the beach closure ordinance "relates to" the taking of seals, it is expressly preempted under

B. The MMPA Clearly and Unmistakably Preempts the Seasonal Beach Closure

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (*Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.* (2004) 541 U.S. 246, 252.) (internal quotation marks omitted) Throughout its brief, Seal Conservancy argues that MMPA preemption does not extend to regulations which, although undoubtedly related to the taking of marine mammals, also involve land regulations. While there is a presumption against preemption in areas traditionally regulated by the states, Congress can preempt any state regulation with an "unmistakably clear" expression of intent to "alter the usual constitutional balance between the States and the Federal Government." (*Gregory v. Ashcroft* (1991) 501 U. S. 452, 460-461.) For example, even though regulation of insurance is traditionally an area of state regulation, Congress was unmistakably clear that ERISA preempted state insurance regulations that "referenced" and "had a connection to" covered employee benefit plans. (*FMC Corp. v. Holliday* (1990) 498 U.S. 52, 59-61.) Here, the text of the beach closure ordinance, the purpose for which it

was designed, and the entirety of the public debate both references and is connected to the taking, i.e. harassment of harbor seals. (See FOCP Answering Brief, pp. 25-33.) Congress was unmistakably clear that this beach closure ordinance comes within the scope of the MMPA's preemption statute.

Seal Conservancy argues the City's reasons for enacting the beach closure are irrelevant. (Amicus Brief, at p. 27.) But when applying similar preemption language under ERISA, the Supreme Court routinely looks to the reasons for enacting the state statute to determine whether ERISA preemption applies. (*Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 140, quoting *Mackey v. Lanier Collection Agency & Service, Inc.* (1988) 486 U.S. 825, 829 ["[We have virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are pre-empted under [ERISA]."].) In this case the evidence is overwhelming and unequivocal: the beach closure ordinance was designed to prevent the harassment of harbor seals. Accordingly, it "relates to" the "taking" of marine mammals, and is therefore preempted.

C. The Seasonal Beach Closure Conflicts With the Express Language and Purpose of the MMPA

Seal Conservancy claims the MMPA's "clear purpose is to protect marine mammal populations" and (without reference to the plain language of Section 1379) it argues that preemption only applies to regulations "that

conflict in some way with the Act." (Amicus Brief at p. 30.) While admitting the beach closure expressly refers to seal harassment, Seal Conservancy nevertheless argues the City's regulation "does nothing to interfere with the federal scheme." (Amicus Brief at pp. 30-31.)

This argument first ignores Section 1379(a)'s clear directive to preempt "any State law or regulation relating to the taking of any species … of marine mammal" in the absence of a transfer of management authority. (16 U.S.C. § 1379(a).) Any regulation, regardless of how much it seems to protect marine mammals, *necessarily conflicts* with Section 1379(a) if it relates to "takings" and is not accompanied by a transfer of management authority.

Second, protecting marine mammals is only one of several purposes of the MMPA. Congress intended for the Secretary to determine which state laws were consistent with the MMPA through the process approving transfers of management authority in Section 1379(b)(1). (See FOCP's Request for Judicial Notice, Exhibit 1, Conf. Rept. on H.R. 10420, 92nd Cong., 2nd Sess., 118 Cong. Rec. 33227 (daily ed. Oct. 2,1972) https://www.gpo.gov/fdsys/pkg/GPO-CRECB-1972-pt25/pdf/GPO-CRECB-1972-pt25-5-2.pdf#page=51 (as of September 19, 2017).)

By giving the Secretary exclusive authority to approve state laws relating to the taking of marine mammals, Congress advanced important objectives of the MMPA. First, it insured the laws regulating the taking of

marine mammals would remain uniform throughout the United States. Nationwide uniformity is vital to the MMPA's expressed objective of encouraging "the development of international arrangements for research on, and conservation of, all marine mammals." (16 U.S.C. § 1361(4).) Congress recognized international agreements would benefit from, if not necessitate, one central management authority to speak for and bind the United States to one uniform regulatory policy. The ordinance frustrates this goal by implementing regulations relating to "takings" without the Secretary's approval and without meeting the MMPA's criteria for a transfer of management authority.

A third goal of the MMPA is to "obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat." (16 U.S.C. § 1361(6).) It is significant that Congress used the word "optimum" instead of "maximum." This recognizes that some populations could become too large for the habitat, and sensibly focuses the goal on population numbers which comport with the specific characteristics of each habitat. This is particularly important at Children's Pool Beach, where the harbor seal population has exploded beyond what the beach can reasonably accommodate, while the colony's foul odors deter public access to the shoreline and nearby businesses. The National Marine Fisheries Service ("NMFS") certainly recognized the seal population far exceeded optimal numbers when it declined to support the City's beach closure. The City's

beach closure regulations frustrate this goal by unilaterally substituting the City's preferences for the NMFS' judgment on the optimum sustainable population of harbor seals. 5 AR 1238-1239 ["we do not believe that complete closure of Children's Pool Beach is necessary to protect the harbor seals from violations of the MMPA."].

Seal Conservancy ignores the explicit conflict between the ordinance and Section 1379(a). Its approach would encourage state regulators to implement inconsistent taking regulations without the Secretary's approval and without meeting the criteria for a transfer of management authority. This would frustrate the MMPA's goal of a nationwide body of law, and would interfere with the objective of securing international conservation agreements. Unapproved state regulations would also interfere with federal efforts to achieve optimum sustainable populations for each local habitat. Even if there were no express preemption statute, these conflicts would render the beach closure ordinance preempted under the MMPA.

D. The MMPA Applies to The Waters and Lands Under the Jurisdiction of the United States

The Seal Conservancy argues the MMPA "limits federal jurisdiction to land beyond the low water mark and, by exclusion, specifically precludes its jurisdiction over the land at issue herein." (Amicus brief, p. 29.) This is demonstrably false. The MMPA is abundantly clear that its provisions

extend to any place under the jurisdiction of the United States, whether on land or sea.

We begin with the presumption that United States law governs domestically. (*Microsoft Corp. v. AT&T* (2007) 550 U.S. 437, 449.) Here, Congress passed the MMPA based in part on the impacts of marine mammals on *interstate* commerce. (16 U.S.C. § 1361(5).) The MMPA bans the taking of marine mammals "in waters or on *lands under the jurisdiction of the United States*." (16 U.S.C. § 1372(a)(2)(A).) (emphasis added) And it prohibits the use of "any *port, harbor, or other place under the jurisdiction of the United States* to take or import marine mammals or marine mammal products." (16 U.S.C. § 1372(a)(2)(B).) (emphasis added) Under the MMPA, the Secretary is empowered to "designate officers and employees *of any State* or of any possession of the United States to enforce the provisions of [the Act]." (16 U.S.C. § 1377(b).) (emphasis added) Anyone authorized by the Secretary to enforce the MMPA may "arrest any person committing in his presence or view a violation of [the Act]" and may "seize, whenever and wherever found, all marine mammals and marine mammal products taken or retained in violation of [the Act]." (16 U.S.C. § 1377(d)(1)&(4).) By extending the MMPA to lands, ports, harbors, and other places "under the jurisdiction of the United States," and by allowing the Secretary to designate State officers to enforce the law, Congress expressed a clear intent to apply the MMPA within State territory. Finally, insofar as the

preemption provision is concerned, Congress made itself unmistakably clear:

> No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species… of marine mammal *within the State* unless the Secretary has transferred authority for the conservation and management of that species… to the State under subsection (b)(1).

(16 U.S.C. § 1379(a).) (emphasis added)

Accordingly, the MMPA and the MMPA's express preemption provision both apply to the land and water within each state.

IV. CONCLUSION

For the foregoing reasons, the trial court did not err in declaring the seasonal beach closure void, unenforceable, and preempted by state and federal law. Accordingly, the judgment should be affirmed.

September 19, 2017 LAW OFFICES OF BERNARD F. KING III

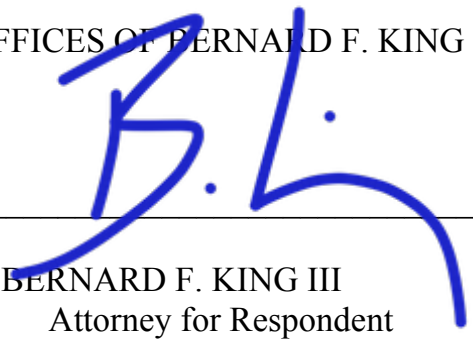
By_____

BERNARD F. KING III
Attorney for Respondent
Friends of the Children's Pool
bking@bernardkinglaw.com

CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)]

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 4,665 words, including footnotes, and is printed in a 13-point typeface. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

September 19, 2017 LAW OFFICES OF BERNARD F. KING III

By 

BERNARD F. KING III
Attorney for Respondent
Friends of the Children's Pool
bking@bernardkinglaw.com

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE
PROOF OF SERVICE

Friends of the Children's Pool v. City of San Diego and The California Coastal Commission
4th Civil No. G053709/G053725
Superior Court Case No. 30-2015-00778153-CU-WM-CJC

I, Bernard F. King III, declare that:

I am at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1455 Frazee Road, Suite 500, San Diego, California, 92108. On September 19, 2017, I served copies of these document(s) as follows: RESPONSE TO AMICUS CURIAE BRIEF FROM RESPONDENT FRIENDS OF THE CHILDREN'S POOL

Clerk of Orange County Superior Court
Hon. Frederick Horn
700 Civic Center Drive West
Santa Ana, CA 9270
(Via U.S. Mail)

Attorneys for Appellant
City of San Diego
Jenny K. Goodman, Deputy City Attorney
Office of the San Diego City Attorney
Work 619.533.6370
jkgoodman@sandiego.gov
(Via True Filing)

Attorneys for Appellant
California Coastal Commission
Baine Kerr, Deputy Attorney General
Office of the Attorney General
baine.kerr@doj.ca.gov
213-897-8964
(Via True Filing)

Attorneys for Amicus Curiae
The Seal Conservancy
John W. Howard
Work 619.234-2842
johnh@jwhowardattorneys.com
(Via True Filing)

I declare under penalty of perjury under the laws of the state of California and the United States of America that the foregoing is true and correct, and was executed on September 19, 2017 in San Diego County, California.

BERNARD F. KING III