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

ANSWERING BRIEF OF PLAINTIFF AND RESPONDENT FRIENDS OF THE CHILDREN'S POOL

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

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Plaintiff and Respondent Friends of the Children's Pool ("FOCP") submits this Answering Brief in response to the Opening Briefs filed by Appellants California Coastal Commission (the "Commission") and City of San Diego (the "City").

I. INTRODUCTION

To prevent the public from harassing a colony of harbor seals during their pupping season, the City and the Commission took the unprecedented step of closing public access to the man-made Children's Pool beach for five months of the year. The trial court set aside Appellants' regulation and granted Respondent's petition for writ of mandate because the beach closure is preempted by both federal and state law.

First, the beach closure falls squarely within the field Congress expressly preempted under the Marine Mammal Protection Act ("MMPA") because (1) it "relates to" the harassment of seals, and (2) the federal government has not transferred management authority over this population of harbor seals.

Second, the beach closure runs afoul of longstanding Legislation granting public access to the Children's Pool, and is thus preempted by Public Resources Code section 30211 because it is development that interferes with coastal access rights the public has acquired through Legislation and over 85 years of recreational use.

Although they never raised the argument in the trial court, Appellants now

claim the seasonal beach closure does not "relate to" the harassment of seals. This argument crumbles under a mountain of evidence that Appellants expressly designed the beach closure to protect seals (and especially their young) from harassment by the beach-going public during pupping season. The connection between the beach closure and seal harassment is not only admitted by Appellants own statements, it is expressly stated in the text of the beach closure regulations themselves. In contrast to their primary argument in the trial court, Appellants have now abandoned their claim that the Secretary of Commerce approved the beach closure and transferred management authority over the seals at the Children's Pool as plainly required by 16 U.S.C. § 1379(a) & (b).

With no clear rejoinder to the express terms of the MMPA preemption statute, Appellants invoke a myriad of arguments based on presumptions, deference, and other tools of statutory interpretation. Whatever relevance these arguments may have in the case of a genuine ambiguity, they are irrelevant when (as is the case here) Congress has clearly and unambiguously expressed its intent to preempt state law.

The trial court was correct in finding Appellants' seasonal beach closure expressly preempted by federal and state law, and the judgment should be affirmed.

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II. FACTUAL BACKGROUND

The Children's Pool is a man-made beach and breakwater located in La Jolla[1] along the rocky bluffs of the Pacific Ocean. The breakwater protects the Children's Pool from the open ocean in order "to reduce wave action and create a shallow, calm swimming area for human use." 2 AR 430.[2] Concrete stairs provide the only public access to the 0.70-acre sand beach. 9 AR 2209.

Ellen Browning Scripps, the prominent San Diego philanthropist, paid for the construction and donated the structure to the City to provide young swimmers with safe beach access, away from dangerous ocean currents. 1 AR 187-188. On May 31, 1931, the City celebrated completion of construction at the Children's Pool.[3] 5 AR 1212-1213; 1 AR 198-199. On June 15, 1931, the Governor of California approved legislation that granted the Children's Pool beach to the City of San Diego in trust, devoted "exclusively to public park, 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." (Stats. 1931, ch. 937, § 1; 16 AR 4076-4078.) (This legislation is hereafter referred to as the "Trust")

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[1] La Jolla is not a separate city, but a neighborhood within the City of San Diego.

[2] Citations to the Administrative Record are labeled [volume number] "AR" [page number(s)]. Thus, "2 AR 430" references volume 2 of the administrative record at page 430. Citations to Appellants' Appendix are labeled AA [page number].

[3] As recounted in the Journal of San Diego History, "The breakwater reflects the philanthropic legacy of Scripps and the dedication and work ethic of Savage. Its construction was an intensive undertaking that created a safer bathing area for children. It remains a durable and lasting structure on La Jolla's coast." 5 AR 1213; 1 AR 199.

Beginning in the 1990's, a small colony of harbor seals began to share the beach with the public. As the seal colony grew in number, people became increasingly divided. People who used the Children's Pool beach wanted the seals removed because they were polluting the water. Other people wanted the seals to stay. The dispute eventually spawned litigation, and in 2007 the Court of Appeal affirmed a judgment that the City violated the Trust by neglecting maintain the Children's Pool in its intended condition. 19 AR 5090-5120.

> Therefore the court concludes that the 1931 Grant requires, at a minimum, the Children's Pool be reasonably available for the purposes and uses specified by the State of California in the Grant. This requires the City to manage and maintain the granted lands for the use of the people of California, the beneficiaries of the Grant. This includes swimming, fishing and related recreational pursuits. The Pool has not been available for such uses since 1997. The City has failed to restore the property for such uses despite the fact it has had the means and ability to do so. The City has breached its obligations as trustee under the 1931 Trust.

19 AR 5118, ln. 9-17.

The court thus ordered the City "to employ all reasonable means to restore the Pool to its 1941 condition" by removing the sand build-up and reducing the contamination caused by the seals. 19 AR 5120, ln. 6-11. Faced with this judgment, the City lobbied the Legislature to amend the Trust so that it would not have to remove the seals. Accordingly, in 2009 Legislature amended the Trust to include a "marine mammal park" alongside the other Trust uses. This allowed the seals to continue sharing the beach with the public. 16 AR 4080-4084.

After the Legislature amended the Trust to authorize joint use, a new City Council set out to restrict public access and to keep people off the beach. It first

installed a seasonal, then later a year-round guideline rope to protect the seals from the beach-going public. 16 AR 4339-4340. "Following reports of seal harassment, …the City determined that the rope barrier was not adequately protecting the seals; therefore, a seasonal closure was necessary to provide undisturbed protection during the vulnerable months of their pupping seasons." 16 AR 4341. According to the City, a seasonal beach closure was necessary "[d]ue to people continually flushing the seals into the water and other documented inappropriate interactions between seals and people." 1 AR 102. "Due to the ongoing inappropriate incidents between humans and harbor seals at the Children's Pool, the [City] contends seasonally prohibiting public access to the Children's Pool while harbor seals are giving birth to, and rearing their young, …is a necessary restriction… to reduce the possibility of harassing marine mammals at the Children's Pool." 1 AR 104. On June 3, 2010, the City Council passed resolution R-305837 which directed the city attorney "to draft an ordinance amending the municipal code… to prohibit public access to the children's pool beach train harbor seal pumping season, from December 15 to May 15" and directed the mayor or his designee "to amend the local coastal program, only if required, to prohibit the public from entering the beach during harbor seal puppy season from December 15 through May 15 in order to effect this directive." 1 AR 7-10.

The City first proposed accomplishing the seasonal beach closure[4] with (1)

[4] The various components of the City's plan to close the beach, e.g. the ordinance, the LCP amendments, the coastal development permit, etc., are collectively referred to herein as the

an ordinance prohibiting public access to the beach during seal pupping season, i.e. December 15 through May 15, (2) corresponding amendments to the La Jolla Community Plan and Local Coastal Program (the "LCP amendments"), (3) a coastal development permit to close the beach during pupping season, (4) a negative declaration under CEQA, and (5) designation of the Children's Pool beach as an environmentally sensitive habitat area ("ESHA") under Public Resources Code section 30240. 1 AR 36, 89; 16 AR 4331. The La Jolla Community Planning Association voted to reject the seasonal beach closure and the proposed LCP amendments on June 6, 2013. 1 AR 29; 4 AR 1053. Shortly thereafter, the City dropped the proposal for an ESHA designation on the advice of Coastal Commission staff. 1 AR 32, 90-93; 16 AR 4331. In its December 5, 2013 staff report to the Planning Commission, the City agreed with the Coastal Commission that "marine mammals are 'Marine resources' and should therefore be regulated under [Public Resources Code] Section 30230" instead of under an ESHA designation. 1 AR 32. The Planning Commission approved the City's amended seasonal beach closure on January 16, 2014, and the proposal then proceeded to the City Council. 5 AR 1092-1096.

On January 2, 2014, Chris E. Yates from the National Marine Fisheries Service ("NMFS") wrote to then Interim Mayor Todd Gloria about the proposed beach closure. 5 AR 1238-1239. Specifically, he advised that NMFS did not

"seasonal beach closure."

believe a beach closure was necessary to protect the seals and that closure was not required under the Marine Mammal Protection Act (MMPA). 5 AR 1238-1239. He further cautioned the City to "review the preemption provisions of MMPA Section 109 (a), 16 U.S. Code Section 1379(a), as it makes decisions to addresses the conflicts at Children's Pool." 5 AR 1238-1239. On January 7, 2014, Michael Costello emailed another copy of Mr. Yates' letter to the City and attached a copy of the MMPA preemption statute at Section 1379(a) of Title 16 of the United Stated Code. 5 AR 1237-1240.[5]

At its meeting on February 24, 2014, the City Council considered the seasonal beach closure and heard comments from the public. At the hearing, Councilmember Lightner referenced Mr. Yates' letter and specifically asked the City attorney if the seasonal beach closure would be preempted by the MMPA. AA 349-350 [Comments of Councilmember Lightner, February 24, 2014 Hearing, p. 116, ln 21- p. 117, ln 8].

At the end of the February 24, 2014 meeting, the City Council approved the beach closure and registered its vote to (1) certify a negative declaration that the proposed seasonal beach closure would not require an environmental impact

[5] In written correspondence prior to the City Council meeting on February 24, 2014 and the Coastal Commission meeting on August 14, 2014, and in comments at those meetings, numerous members of the public cited Mr. Yates' letter and raised the issue of MMPA preemption with both the City and the Commission. 3 AR 632-633; 5 AR 1237-1240, 1244-46; 17 AR 4396, 4415, 4426-29, 4434-35, 4525; 19 AR 5196, 5047-48, 5165, 5215-17; 22 AR 6026; AA 327, p. 25, ln 19-25; AA 390, p. 65, ln 12 – p. 66, ln 4; AA 393, p. 80, ln 9-18.

report[6]; (2) approve the proposed LCP amendments[7]; and (3) approve the proposed ordinance[8] prohibiting beach access during seal pupping season. AA 354-355 [February 24, 2014 Hearing at p. 134, ln 2 – p. 140, ln 5].

After the City Council approved the seasonal beach closure, the City applied to the Commission for approval of the (1) LCP amendments; and (2) a coastal development permit. In the Commission's final staff report, it stated that the beach closure was necessary "as all lesser means of protecting the seals while still providing continuous public access have failed to prevent a small but significant number of people from harassing the seals during their vulnerable months of pupping season." 16 AR 4330. The staff report noted that the seasonal beach closure "is intended to reduce the potential for harassment of the seals by the public during the vulnerable pupping season, and subsequently mitigate, to the extent possible, the adverse impacts that can result from such harassment events." 16 AR 4341.

Prior to the Coastal Commission hearing, on June 13, 2014, Chris Yates of the NMFS wrote a second letter about the beach closure to FOCP's President, Ken

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[6] 1 AR 128-32.

[7] On March 12, 2014, the City Council passed a final resolution adopting the LCP amendments. Detailed descriptions of each change to the LCP are set forth at 5 AR 1161-1166; 1 AR 95, 97-98.

[8] The ordinance, which received final approval from the City Council on March 18, 2014 and was signed into law by the mayor on April 2, 2014, added the following language at San Diego Municipal Code ("SDMC") section 63.0102, subdivision (e)(2): "It is unlawful for any person to be upon or to cause any person to be upon the beach of the La Jolla Children's Pool, starting from the lower stairs to the beach beginning at the second landing, from December 15 to May 15." 1 AR 4, 11-12.

Hunrichs. 19 AR 4956. The letter was then forwarded to the Commission on July 24, 2014 and included as part of the record. 19 AR 4956. In his letter, Mr. Yates criticized the beach closure, and reiterated that "it remains my opinion that the most preferable outcome is one of shared use - where the MMPA is complied with but no unnecessary restrictions are placed on other beach or ocean users." 19 AR 4956. Mr. Yates went on to warn that the proposed beach closure would run afoul of the MMPA:

> I also recommend the City, in making decisions to addresses the conflicts at Children's Pool Beach, review the pre-emption provisions of MMPA Section 109(a), 16 U.S.C. Section 1379(a). In general terms, Section 109(a) prohibits enforcement of laws or regulations relating to the taking of marine mammals except by a state to which the Secretary of Commerce or the Secretary of the Interior has transferred authority for the conservation and management of the species. *That authority has not been transferred to the City.*

19 AR 4956. (emphasis added)

On August 14, 2014, the Commission approved the City's proposed LCP amendments and granted the City a coastal development permit to close public access to the Children's Pool from December 15 to May 15 every year. 22 AR 6066-6067. In its findings, the Commission observed that the seasonal beach closure is "intended to eliminate the potential for harassment of the seals by the public during the vulnerable pupping season, and subsequently eliminate the adverse impacts that can result from such harassment events." 22 AR 6081-6082. Although the Commission acknowledged it does not regulate the taking of marine mammals, it asserted the power to approve the beach closure because if "there is

unauthorized harassment, or incidental 'taking', of the seals at the Children's Pool area, then such acts of harassment are not consistent with Chapter 3 policies of the Coastal Act because such activities would not achieve the protections provided under section 30230." 22 AR 6085. After examining the history of regulation at the Children's Pool, the Commission found that "existing guidelines provided by the rope barrier, informational signage, and stationed park ranger have not deterred or eliminated seal harassment, as described above with the numerous recordings of flushing and harassment incidents." 22 AR 6089. It concluded "[t]he seals will continue to be subject to harassment and endangerment if the beach is not closed off during pupping season." 22 AR 6089. Thus, the Commission approved the seasonal beach closure because it "would maintain and enhance the seal rookery and haul out site as well as the seal population at Children's Pool Beach, consistent with Section 30230 of the Coastal Act, by minimizing human-seal interaction and eliminating any potential for harassment of the seals during the vital pupping months." 22 AR 6090-6091. The City began enforcing the beach closure on December 15, 2014, and has continued to prohibit all public access to the beach between December 15 and May 15 since it was enacted.

III. PROCEDURAL HISTORY

After the Commission approved the LCP amendment and coastal development permit, FOCP filed this action to overturn the beach closure under Code of Civil Procedure sections 1085 and 1094.5, and Public Resources Code

section 30801. Pursuant to the parties' stipulation and Public Resources Code section 30803, the case was transferred to Orange County in March 2015. The administrative record was completed in November 2015, and FOCP filed its moving papers on January 8, 2016. The City and the Commission filed oppositions, FOCP filed its reply, and the matter was heard before the Honorable Frederick Horn on March 16, 2016.

In their opposition papers and at the hearing, Appellants argued the seasonal beach closure was "a local and state act that implemented the Marine Mammals Protection Act" because the NMFS "specifically recommended that the City take action to close the beach seasonally during pupping season because people were harassing the seals." RT 6, ln 21 – 7, ln 17. Appellants claimed that earlier letters from the NMFS provided the necessary authority for Appellants to regulate the harassment of seals under the MMPA. RT 7, ln 18 – RT 8, ln 24.

On May 3, 2016, the trial court issued its statement of decision granting FOCP's petition. AA 550-566. The trial court first acknowledged that the MMPA expressly preempts any state law or regulation relating to the taking of marine mammals, unless the Secretary[9] has transferred management authority over the corresponding population of marine mammals in accordance with the statutory

[9] With respect to harbor seals, the term "Secretary" as used in the MMPA refers to the secretary of the department under which the National Oceanic and Atmospheric Association (hereafter "NOAA") operates. (16 U.S.C. § 1362(12).) NOAA, which also oversees the NMFS, presently operates under the Commerce Department. Thus, the Secretary of Commerce is responsible for approving and overseeing transfers of harbor seal management authority.

procedures. AA 551, ln 18-21. The court noted that harbor seals are "marine mammals" and that a "taking" includes "harassment" of a marine mammal. AA 560, ln 18-22. The court then considered Appellants' argument that letters from NMFS staff demonstrated the Secretary had transferred management authority over harbor seals under the procedures set forth in Section 1379(b)(1). The trial court rejected this argument in its final decision:

> Neither City, nor Commission, formally sought Secretary's express authority to amend a City Ordinance to require seasonal closure of the Children's Pool Beach from December 15 to May 15 during the harbor seal pupping season each year, nor to issue a permit allowing such conduct by City. …¶ NMFS corresponded with City on January 2, 2014, commencing with "[t]his letter *provides comments from the West Coast Region* of the National Marine Fisheries Service (NMFS) on the City of San Diego's (City) proposal to prohibit the public from entering the sandy area of Children's Pool Beach in La Jolla during harbor pupping season from December 15th through May 15th." (Emphasis added.) NMFS did not agree that complete closure of the beach was required during the pupping season, did not state that the Secretary authorized the proposal, nor even that a determination had been made by the Secretary, or an authorized individual, on this issue. …¶ At most, the administrative record establishes that the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, West Coast Region, was aware that City intended to amend an ordinance to prohibit the public from entering the Children's Pool Beach during the seal pupping season.

AA 564, ln 11-23.

Accordingly, the trial court concluded the beach closure was preempted under federal and state law as follows:

- The City's LCP amendments 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 to beach access acquired under the Coastal Act, the

California Constitution, and the terms of the legislation granting Children's Pool Beach to the City;

- The City's LCP amendments and beach closure ordinance adopted in 2014 relate to the taking of marine mammals, and are therefore void, unenforceable and preempted by 16 U.S.C.A. section 1379(a) of the Marine Mammal Protection Act ("MMPA")

(AA 551, ln 1-10.)

The City and the Commission both appealed from the judgment.

IV. STANDARD OF REVIEW

"A judgment . . . is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) (internal citations and quotation marks omitted) "An appellant bears the burden to show not only that the trial court erred, but also that the error was prejudicial in that it resulted in a miscarriage of justice." (*Hoffman Street, LLC v. City of West Hollywood* (2009) 179 Cal.App.4th 754, 772; Cal. Const., art. VI, § 13.) To demonstrate prejudicial error, an appellant must provide an adequate record of the trial court proceedings and include specific page citations in its briefs illustrating the error. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) Issues not specifically raised at trial are forfeited on appeal, and issues not specifically raised in the appellate briefs are waived. (*Premier Medical Management Systems, Inc. v.*

California Ins. Guarantee Assn. (2008) 163 Cal.App.4th 550, 564; *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1410.)

A trial court may issue a writ of administrative mandate if an agency has (1) acted in excess of its jurisdiction, (2) deprived the petitioner of a fair hearing, or (3) committed a prejudicial abuse of discretion. (Code Civ. Proc. § 1094.5, subd. (b).) An abuse of discretion under section 1094.5 exists if an agency "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 the evidence." (*Ibid.*) Accordingly, mandate will issue to invalidate legislative acts and administrative decisions in excess of a governing body's authority and contrary to controlling law. "Generally, whether an agency has proceeded lawfully is a legal question that the trial court and appellate court *both* review de novo." (*Stewart Enterprises, Inc. v. City of Oakland* (2016) 248 Cal.App.4th 410, 420.) (emphasis added) Thus, when considering whether an administrative agency's decisions are preempted by state or federal law, trial courts are not bound by the standards of review they must apply when reviewing the sufficiency of an agency's factual findings.

An appellate court will independently review a trial court's preemption decision when it turns on undisputed facts. (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1476; *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10 ["federal preemption presents a pure question of law"];

Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2006) 136 Cal.App.4th 119, 129 ["The issue of preemption of a municipal ordinance by state law presents a question of law, subject to de novo review."].) However, "insofar as the court resolved disputed issues of fact, its findings are reviewed under the substantial evidence standard, i.e., they will be sustained unless shown to lack substantial evidentiary support." (*Cellphone Termination Fee Cases* (2011) 193 Cal.App.4th 298, 311.)

The substantial evidence standard applies to both express and implied findings of fact made by the trial court in its statement of decision. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462, citing *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793.) The doctrine of implied findings derives from Code of Civil Procedure section 634 and provides that a party must object to the trial court's statement of decision to avoid implied findings on appeal in favor of the prevailing party. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134, fn. omitted.) "Stated otherwise, the doctrine (1) directs the appellate court to presume that the trial court made all factual findings necessary to support the judgment so long as substantial evidence supports those findings and (2) applies unless the omissions and ambiguities in the statement of decision are brought to the attention of the superior court in a timely manner." (*SFPP v. Burlington Northern & Santa Fe Ry. Co., supra,* 121 Cal.App.4th at p. 462.)

"Where [a trial court's] findings of fact are challenged on a civil appeal, … the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings below. [The reviewing court] must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) (internal citations and quotation marks omitted)

V. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN RULING THAT FEDERAL LAW PREEMPTS THE SEASONAL BEACH CLOSURE

Federal Preemption is rooted in the Supremacy Clause which provides that the Constitution, treaties, and statutes of the United States "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. IV, cl 2.) (emphasis added) "The *non obstante* provision of the Supremacy Clause indicates that a court need look no further than the ordinary meaning of federal law, and should not distort federal law to accommodate conflicting state law." (*PLIVA, Inc. v. Mensing* (2011) 564 U.S. 604, 617 [131 S. Ct. 2567, 2580].) (internal quotations omitted)

The ways in which federal law may preempt state law are well established and turn on congressional intent. (*Ingersoll-Rand Co. v. McClendon* (1990) 498

U.S. 133, 137-38.) First, Congress may expressly state in a statute its intention to preempt state laws. (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525.) State law is also preempted if it actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230.) "It is, finally, axiomatic that 'for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.'" (*Wis. Pub. Intervenor v. Mortier* (1991) 501 U.S. 597, 606-608, quoting *Hillsborough County v. Automated Medical Laboratories, Inc.* (1985) 471 U.S. 707, 713.)

A. The MMPA Expressly Preempts the Seasonal Beach Closure

"When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" (*Chamber of Commerce of US v. Whiting* (2011) 563 U.S. 582, 591 [131 S.Ct. 1968, 1977], quoting *CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. 658, 664.) "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, 842-843.)

1. Congress Unambiguously Preempted All State Laws That "Relate To" the Harassment of Harbor Seals Absent a Transfer of Management Authority

Enacted in 1972, the Marine Mammal Protection Act (codified at 16 U.S.C. §§ 1361, et seq.) (the "MMPA") puts the federal government in charge of regulating the "taking" of marine mammals, including harbor seals and other pinnipeds.[10] (16 U.S.C. § 1362(6).) As part of its comprehensive regulatory scheme, the MMPA grants "exclusive jurisdiction over the conservation and management of marine mammals to the federal government." (*Florida Marine Contractors v. Williams* (M.D.Fla. 2005) 378 F.Supp.2d 1353, 1357-58, citing 16 U.S.C. § 1379(a).) Specifically, Section 1379(a)[11] of the MMPA states:

> No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any … marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as "management authority") to the State under subsection (b)(1) of this section. (emphasis added)

(16 U.S.C. § 1379(a).)

"Take" is defined broadly to mean "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." (16 U.S.C. § 1362(13).) The

[10] As defined under the MMPA, "[t]he term "marine mammal" means any mammal which is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea)." (16 U.S.C. § 1362(6).) The harbor seals at the Children's Pool are thus "marine maammals" under the MMPA because they are both morphologically adapted to the marine environment and within the order Pinnipedia.

[11] Unless otherwise stated, all statutory references in Part V of this brief refer to Title 16 of the United States Code, e.g. Section 1379 refers to 16 U.S.C. § 1379.

definition of "take" includes any negligent or intentional act which results in disturbing or molesting a marine mammal. (50 C.F.R. § 216.3; *Natural Resources Defense Council, Inc. v. Evans* (2003) 279 F.Supp.2d 1129, 1141.) "Harassment" includes "any act of pursuit, torment, or annoyance which (1) has the potential to injure a marine mammal…; or (2) has the potential to disturb a marine mammal … by causing disruption of behavioral patterns, including, but not limited to, … nursing, breeding, feeding, or sheltering. (16 U.S.C. § 1362(18)(A).)

The incidental harassment of seals by people on the beach, e.g. by causing them to flush during pupping season, is a "taking" under the MMPA. 15 AR 5666 ["The most disruptive of human interactions are those that lead to animals flushing into the water, causing animals to expend energy and prevent them from gaining the benefits of hauling out (e.g., rest or thermoregulation). … Biologists have observed that the presence of people on the beach near the hauled out seals or at the water's edge typically results in large numbers of seals flushing."]. The City and the Coastal Commission do not and cannot dispute that causing seals to flush during the pupping season, approaching them too closely, or otherwise harassing on the beach them is a "taking" under the MMPA. See e.g. 1 AR 37-38, 44; 16 AR 4343-4348.

Accordingly, the plain wording of Section 1379(a) unambiguously discloses Congress' intent to preempt the enforcement of any laws which "relate to" the harassment of seals, unless the Secretary has transferred management authority to the state pursuant to Section 1379(b)(1).

2. Substantial Evidence Supports the Trial Court's Finding That the Seasonal Beach Closure "Relates To" the Harassment of Harbor Seals

When Congress expressly preempts state laws which "relate to" a subject, it intends to establish the regulation of that subject "as exclusively a federal concern." (*Alessi v. Raybestos Manhattan, Inc.* (1981) 451 U.S. 504, 523 [regulation of employee benefit plans exclusively federal concern].) The Supreme Court has "repeatedly recognized" that the phrase "relate to" in a preemption clause expresses "a broad pre-emptive purpose." Congress characteristically employs the phrase to reach any subject that has "a connection with, or reference to," the topics the statute enumerates. (*Coventry Health Care of Missouri, Inc. v. Nevils,* No. 16-149 (U.S. April 18, 2017) 581 U. S. ___, ___ (slip op., at p. 7.), citing *Morales v. Trans World Airlines, Inc.* (1992) 504 U. S. 374, 383-384.) The same rules apply to the phrase "relating to" under the MMPA's express preemption statute. Here, the seasonal beach closure "relates to" the taking of marine mammals because it has a connection with or reference to the harassment of harbor seals, and is thus preempted under Section 1379(a).

In its opening brief, the Coastal Commission adds several erroneous and unsupported limitations to the scope of the phrase "relating to" in express preemption provisions. First, it asserts that "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*." (Commission Opening Brief at p. 25.)

(emphasis added) This is simply incorrect. Whether the state regulation is consistent with or at odds with federal law is irrelevant – if it "relates to" the preempted subject matter, it cannot be enforced. (*Morales v. Trans World Airlines, Inc., supra,* 504 U.S. at pp. 386-387; *Mackey v. Lanier Collection Agency & Service, Inc.* (1988) 486 U.S. 825, 829 ["The pre-emption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."].)

Next, the Coastal Commission argues the seasonal beach closure did not "relate to" the taking of marine mammals because it only applied "laws of general applicability - a municipal ordinance and the Coastal Act - to regulate the time and manner of public access to the beach." (Commission Opening Brief at p. 25.) Even if the beach closure was a law of general applicability (and it is not), it makes no difference to the question of express preemption. The Supreme Court has "consistently rejected this precise argument" when construing the phrase "relating to" in express preemption provisions under the ADA and ERISA. (*Morales v. Trans World Airlines, Inc., supra,* 504 U.S. 374, 386; *Ingersoll-Rand Co. v. McClendon, supra,* 498 U.S. 133, 139 ["[A] state law may `relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect."]; *American Airlines v. Wolens* (1995) 513 U.S. 219, 227-228 [ADA preempts claims for deceptive airline marketing under generally-applicable consumer fraud statutes.].)

Heeding the Supreme Court's instruction that the phrase "relating to" reflects a broad preemptive purpose, Federal Courts have rejected attempts to narrow the scope of the MMPA's express preemption statute. In *UFO Chuting v. Young*, (Dist. Hawaii, 2004) 327 F.Supp.2d 1220 ("UFO Chuting I"), the court considered when the MMPA preempts state laws that "relate to" the "taking" of marine mammals. There, the plaintiff challenged a state law prohibiting parasailing within the Hawaiian Islands Humpback Whale National Marine Sanctuary between December 15 and May 15. (*Id.* at p. 1221-1222.) Citing the broad definition of "relates to," the court concluded the law "relates to" the taking of humpback whales, because "a primary intent of, and justification for, the parasailing restriction is to prevent the harassment of whales." (*Id.* at p. 1223.) Even though the Legislature had additional reasons for the law, e.g. water safety, noise pollution, these were irrelevant to the preemption analysis. (*Id.* at pp. 1223-1224 ["That the State considered other justifications as well when it adopted the restriction does not mean that the restriction does not relate to the safety of whales."].)[12]

[12] The decision in *UFO Chuting I* was later superseded by an amendment to the MMPA. After the state appealed the ruling in *UFO Chuting I*, Congress responded by granting Hawaii a special exemption from MMPA preemption. (*UFO Chuting of Hawaii, Inc. v. Young* (D. Hawaii 2005) 380 F. Supp. 2d 1166, 1167-68 ("UFO Chuting II"). The new law "exempts Hawaii from 16 U.S.C. § 1379(a), *which otherwise preempts state laws and regulations 'relating to the taking' of marine mammals*." (*Id.* at pp. 1171-72.) (emphasis added) By granting Hawaii an exception to MMPA preemption, while leaving Section 1379(a) unchanged, Congress implicitly affirmed the preemption ruling in *UFO Chuting I*.

Like the parasailing restriction in *UFO Chuting I*, the seasonal beach closure here relates to the "taking" of marine mammals, because its purpose is to prevent the harassment of seal mothers and their pups during pupping season. On its face, the seasonal beach closure applies only during seal pupping season, i.e. December 15 through May 15. The LCP amendments specifically provides that "seasonal access restrictions and a buffer are designated for the Children's Pool Beach *in order to protect breeding pinnipeds*" and that "*[i]n order to protect breeding Harbor Seals*, no public access is permitted below the top of the lower staircase leading down to the sand during seal pupping season." 1 AR 95, 98; 22 AR 6148, 6150-6151. (emphasis added) The Commission's coastal development permit expressly requires the City to submit a monitoring plan that addresses "the method of determining *the effectiveness of the seasonal beach closure at minimizing harassment of hauled out seals*." 22 AR 6179-6180; 15 AR 4007-4008. (emphasis added) The City's monitoring plan must include "[p]rovisions for taking measurements of the number of harassment instances, including what activities would qualify as harassment consistent with relevant regulatory definitions of harassment (e.g. seals flushing into water) under the MMPA." 22 AR 6180; 15 AR 4008. "Upon implementation of the seasonal beach closure," the coastal development permit requires the City (or its representative) to "record the number of seals hauled out at Children's Pool Beach, … the number of harassment instances, the number of citations and warnings issued, the outcomes of issued citations and warnings if available, … and the date at least 16 days per month." 22

AR 6180; 15 AR 4008. The connection with and reference to seal harassment is *expressly stated* in the text of the seasonal beach closure.

Beyond the mere text of the law, the record unambiguously supports the trial court's conclusion that the seasonal beach closure relates to the taking of marine mammals. In its findings, the Commission declared that "[t]he purpose of the proposed beach closure is to provide the seals with an undisturbed rookery during pupping seasons so they can properly care for their newborn pups." 22 AR 6077; 15 AR 4010. In its own words, it ultimately approved the beach closure because "existing guidelines provided by the rope barrier, informational signage, and stationed park ranger have not deterred or eliminated seal harassment" and the "seals will continue to be subject to harassment and endangerment if the beach is not closed off during pupping season." 22 AR 6089; 15 AR 4021.

In explaining the need for the seasonal beach closure, City staff noted that "existing regulations/guidelines have not completely resolved inappropriate interactions [i.e. harassment] between seals and citizens." 1 AR 37. "The seasonal closure is seen as the minimum step to reduce the possibility of harassing marine mammals at the Children's Pool." 1 AR 104. The City specifically focused on preventing seal "flushes," i.e. where humans on the beach cause seals to flee the area and retreat into the water. 1 AR 37-38. After citing a letter from Commission staff, the City goes on to eliminate any doubt that the seasonal beach closure is designed to prevent harassment of seals.

> To summarize, not only is the existing access and harassment inconsistent with the Statewide Interpretive Guidelines for Public Access, the harassment is, in the opinion of San Diego Coastal Commission staff, a violation of the Coastal Act…. While attempts at voluntary compliance via docent-sponsored education worked at the Bolinas lagoon rookery, human-induced flushes at Children's Pool, which violate the MMPA and the Coastal Act, continue at an unacceptable rate.

1 AR 44. (emphasis added)

Numerous comments from the City Council and the Coastal Commission demonstrate that the seasonal beach closure not only "relates to" to the harassment of harbor seals, but that preventing such harassment was the primary purpose. See e.g., 16 AR 4343-4348; AA 354 [Comments of Councilmember Marti Emerald, February 24, 2014 Hearing, p. 135, ln 8-23. ("I don't understand the mentality of anybody who would abuse an animal, especially when it's in the process of giving birth; … that's why we have to take the lead here and make sure we protect these animals during pupping season.")]; AA 417 [Comments of Commissioner Bocho, August 14, 2014 hearing, pp. 173, ln 20 – p. 174 ln 2 ("I just think all of the evidence that I've heard today has proven that these seals have been harassed during the pupping season. I believe that the purposeful activity by humans to intentionally flush them into the water has been observed many, many times, and I think that it comes under the protection not only of the Coastal Act, but of the legislature that deems this pool a mammal -- a mammal park.")].

Despite the clear evidence that the beach closure's primary purpose was to stop seal harassment, the Commission argues (for the first time on appeal) that the seasonal beach closure does not "relate to" the harassment of seals because it

might reduce conflict at the beach between beachgoers and groups who oppose beach access, and it might reduce the risk of seals biting people. (Coastal Commission Opening Brief at p. 26.) However, when the primary purpose of the law "relates to" the harassment of marine mammals, the presence of additional reasons does not change the preemption analysis. (*UFO Chuting I, supra,* 327 F. Supp. 2d at pp. 1223-1224 ["That the State considered other justifications as well when it adopted the restriction does not mean that the restriction does not relate to the safety of whales."].) The goal of preventing seal harassment dominated the discussion and debate at every stage of the approval process. These alternative justifications (which bear no logical relationship to the seal pupping season) were given short, passing references – if they were even mentioned at all.[13] The connection between the seasonal beach closure and seal harassment was not just expressly acknowledged by the Commission and the City, it was explicitly referenced in the law itself.

Simply put, the evidence that the seasonal beach closure was intended to prevent the public from harassing harbor seals during pupping season is overwhelming and undeniable. Even assuming the Commission did not waive this argument by failing to assert it in the proceedings below, the trial court did not err

[13] In 2010, NMFS staff supported a beach closure to stop seal harassment and suggested the City could avoid MMPA preemption by passing a law (ostensibly for some non-preempted reason), "which may have a side benefit of preventing harassment of a marine mammal." 1 AR 81. Congress did not intend preemption and the requirements of assuming management authority could be avoided by characterizing a law's relationship to marine mammals as merely a "side benefit."

in finding the seasonal beach closure "relates to" the taking of marine mammals under the MMPA.

3. Substantial Evidence Supports the Trial Court's Finding That the Secretary Has Not Transferred Management Authority to the City, the Commission, Or Any Other State Agency

The MMPA expressly preempts state laws relating to the taking of harbor seals "unless the Secretary has transferred authority for the conservation and management of that species to the State under subsection (b)(1) of this section." (16 U.S.C. § 1379(a).) If the Secretary transfers management authority under Section 1379(b)(1), the details of the transfer must be published in the Federal Register and listed in the Federal Regulations. (50 C.F.R. § 403.03(h).) The regulations reveal no existing transfers of management authority, and there is no evidence in the record suggesting otherwise. (50 C.F.R. § 403.08.) In fact, the NMFS was quite clear that management authority has not been transferred in this case. 19 AR 4956 ["In general terms, Section 109(a) prohibits enforcement of laws or regulations relating to the taking of marine mammals except by a state to which the Secretary of Commerce or the Secretary of the Interior has transferred authority for the conservation and management of the species. That authority has not been transferred to the City."]; 21 AR 5673.

It appears the City and the Commission have abandoned their argument to the trial court that letters from the NMFS qualify as transfers of management authority under the MMPA. (Commission Opening Brief at p. 25.) As no other

statutory exemption applies, the seasonal beach closure is expressly preempted by Section 1379(a) of the MMPA.

4. Preemption of the Seasonal Beach Closure Fulfills the Purpose of the MMPA

After first arguing that the seasonal beach closure does not "relate to" to the harassment of seals, the Commission asserts the law was not preempted because the beach closure "which protected a seal rookery from 'the adverse effect of man's actions' – furthered the purpose of the MMPA." (Commission Opening Brief at p. 28.) Similarly, the City argues there is no conflict with the MMPA because "the effect of the seasonal beach access restrictions is for the protection of the seals that use the Children's Pool Beach for a haul out." (City's Opening Brief at p. 27.)

As noted above, these arguments fail to appreciate the broad scope of preemption under the MMPA. Whether the state regulation appears to be consistent with the MMPA is irrelevant – if it "relates to" the preempted subject matter, it cannot be enforced. (*Morales v. Trans World Airlines, Inc., supra,* 504 U.S. at pp. 386-387; *Mackey v. Lanier Collection Agency & Service, Inc., supra,* 486 U.S. 825, 829 ["The pre-emption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."].)

Moreover, the seasonal beach closure does in fact conflict with the MMPA. Appellants' arguments ignore that Congress intended the MMPA to create a

national, unified system for regulating the taking of marine mammals, and thus expressly preempted any state law relating to such takings – regardless if the law is consistent or inconsistent with other MMPA objectives. That is not to say Congress forbade any state involvement in the protection of marine mammals – it certainly did not. But the text of Section 1379 is clear that states must first apply for and receive a transfer of federal management authority before they can enforce laws relating to the taking of marine mammals.

In support of their argument that Section 1379 does not apply to laws protecting marine mammals from harassment the Commission and the City rely on *State v. Arnariak*, (1997) 941 P.2d 154 ("Arnariak"). *Arnariak* involved a remote, uninhabited island that Alaska designated as a walrus sanctuary in 1960, prior to the MMPA's passage in 1972. Defendant was charged with unlawfully accessing the island without a permit and discharging a firearm in violation of Alaskan law. The *Arnariak* court rejected a claim that Section 1379(a) preempted the state regulations for three reasons: (1) the purpose of the MMPA purportedly supports state laws protecting marine mammals, (2) the legislative history of the MMPA purportedly supports state laws protecting marine mammals, and (3) the presumption that statutes like the MMPA should be construed to avoid an unconstitutional taking of Alaska's property. In a thorough and well-reasoned dissent, Justice Shortell persuasively argued that the majority got it wrong.

> To conclude that preempting Alaska's walrus sanctuary regulations would be contrary to Congress's intent, the court assumes that the overriding purpose of the MMPA is to protect marine mammals. Certainly, marine

> mammal protection is the "major objective" of the act. However, protection was not Congress's exclusive objective. Instead, the MMPA's structure and legislative history indicate that several objectives concerned Congress when it enacted the MMPA. ……¶ No portion of the act or its legislative history suggests that Congress intended to permit Alaska to enforce regulations that would upset this balance, even if those regulations provided strong protections for marine mammals.

(*Arnariak, supra,* 941 P.2d at p. 160-162 [J. Shortell dissent].) (internal citations omitted)

Justice Shortell further pointed out that "a narrow interpretation of the MMPA's preemption clause would thwart specific provisions included in § 1379(b)(1) of the MMPA to ensure that no state law would frustrate any of the multiple objectives addressed in the act."

> Section 1379(b)(1) sets forth several criteria that a state must meet before gaining authority to enforce its laws relating to the taking of walruses. Of those criteria, the very first requires states to have developed "a program for the conservation and management of [walruses] that … is consistent with the purposes, policies, and goals of this chapter." Under the court's ruling, a state such as Alaska that has not attained management authority for walruses could nevertheless enforce regulations that do not conform to all of the MMPA's purposes, policies, and goals so long as those regulations protect walruses. Congress surely could not have intended to allow Alaska to make such an end run around the requirements of § 1379(b)(1).

(*Arnariak, supra,* 941 P.2d at p. 160-162 [J. Shortell dissent].) (internal citations omitted)

In other words, the MMPA does not prohibit the state from enforcing laws or regulations to protect marine mammals, it simply conditions that regulatory jurisdiction upon prior federal approval. Thus, if the state wants to enforce these laws it only needs to satisfy the minimum requirements for a transfer of

management authority under Section 1379(b). On the other hand, enforcing laws like the seasonal beach closure before the transfer of management authority would conflict with the cooperation requirements of section 1379(b)(1) would be utterly inconsistent with Congress' intent in passing the MMPA.

The Commission and the City both rely on a portion of an early House committee report on the MMPA, which states that "[i]t is not the intention of this Committee to foreclose effective state programs and protective measures such as sanctuaries." (Commission Opening Brief at p. 29; City Opening Brief at pp. 21-22.) While this excerpt relates to section 109 of the House bill, Congress did not enact the House's version of section 109. (*Arnariak, supra,* 941 P.2d at 162.) Instead, a House and Senate conference committee modified the House's version of section 109 to conform to amendments proposed by the Senate. (*Id.* at p. 162, citing H.R. Conf. Rep. No. 92-1488, 2d Sess., p. 25 (1972), reprinted in 1972 U.S. Code Cong. & Admin. News, pp. 4187-88[14].) A more appropriate gauge of Congressional intent exists in the conference committee's report as it pertains to the amended version of section 109.

> The House bill preempted State law, but allowed cooperative agreements with the States in harmony with the purposes of the Act. The Senate amendment allowed the Secretary to review State laws and to accept those that are consistent with the policy and purpose of the Act. The conference substitute clarifies the Senate version to assure that the Secretary's

[14] FOCP has requested judicial notice of this Conference Committee report. A copy of the report from the Congressional Record is attached to the concurrently filed Request for Judicial Notice and is also available online as follows: 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 May 4, 2017).

> determination will control as to whether or not the State laws are in compliance. Once granted authority to implement its laws relating to marine mammals, the State concerned may issue permits, handle enforcement, and engage in research. ¶ Thus, rather than supporting the court's interpretation of § 1379(a), this portion of the legislative history is consistent with the view that Congress intended to preempt state laws that are inconsistent with the multiple policies and objectives of the act.

(*Arnariak, supra,* 941 P.2d at p. 162 [J. Shortell dissent].)

As noted above, Justice Shortell's arguments were eventually vindicated when the *Arnariak* decision was soundly rejected by the court in *UFO Chuting I*. When Congress later exempted Hawaii from MMPA preemption, it otherwise affirmed *UFO Chuting I*'s interpretation of section 1379(a) and made no effort to modify the statute. Accordingly, the *Arnariak* decision does not reflect the intent of Congress and should not be relied on.

5. MMPA Preemption of the Seasonal Beach Closure Is Not an Unconstitutional Taking

Citing the general rule that ambiguous statutes should be interpreted to avoid an unconstitutional result, the City argues that if "the MMPA were construed to mandate unfettered access to state owned property, that would render the MMPA provision unconstitutional." (City's Opening Brief at p. 23.) Even if the MMPA's preemption statute was ambiguous (and it is not), the City's argument is unavailing.

First, the statute expressly allows states to enforce laws like the seasonal beach closure, *provided that the Secretary has transferred management authority pursuant to section 1379(b)(1).* In this case, neither the City nor any state agency

has received (or even applied for) a transfer of management authority of harbor seals at the Children's Pool. It is premature to speculate about a potential taking before the City has even attempted to secure the requisite permission. As the Supreme Court has made clear, "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." (*Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City* (1985) 473 U.S. 172, 190.) The City cannot claim preemption will result in an unconstitutional taking before it has even applied for management authority under the MMPA.

Second, the preemption statute does not "mandate unfettered access" to the City's property, nor does it take away the City's "right to exclude." On its face, the statute only preempts laws and regulations relating to the taking of marine mammals. "It is accepted that Congress has the authority, in exercising its Article I powers, to preempt state law." (*California v. ARC America Corp.* (1989) 490 U.S. 93, 100.) Unless and until the Secretary transfers management authority, the MMPA simply prohibits Appellants from enforcing any law, including this beach closure, which relates to the harassment of seals at the Children's Pool.

Third, the Supreme Court has never applied the law of regulatory takings to federal preemption of state and local laws. Even if the law of regulatory takings did apply in this case, it is well established that "not every destruction or injury to

property by governmental action has been held to be a 'taking' in the constitutional sense." (*Armstrong v. United States* (1960) 364 U.S. 40, 48.) Rather, determining when a law violates the Taking Clause requires an examination into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. (*Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124.) In this case, the land is public tidelands held by the City in trust for the public. "'[O]wnership' of public tidelands and submerged lands, …is not of a proprietary nature." (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482.) Upholding the preemption statute will cause no investment loss, no diminution in market value, and no loss of the City's proprietary interests. The City will simply continue to hold the Children's Pool in trust for the public. This issue is a red herring and poses no serious obstacle to MMPA preemption.

B. The Seasonal Beach Closure Is Preempted Because It Regulates a Field Congress Intended to be Exclusively Federal

States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance. (*Gade v. National Solid Wastes Management Assn.* (1992) 505 U.S. 88, 115.) The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive ... that Congress left no room for the States to supplement it." (*Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. 218, 230.)

Here, the MMPA sets forth a comprehensive, nationwide system to manage the taking, importation, and conservation of marine mammals. The act restricts the taking and importation of marine mammals, and authorizes the Secretary to regulate these activities. (16 U.S.C. §§ 1372, 1373.) The MMPA authorizes the Secretary to issue permits for taking marine mammals, investigate violations of act, issue fines and penalties, and designate state employees to help enforce the act. (16 U.S.C. §§ 1374, 1375, 1376 & 1377.) Congress even gave the Secretary authority to initiate negotiations for international agreements regarding the conservation and importation of marine mammals. (16 U.S.C. § 1378.) Most importantly, the MMPA prohibits any state law or regulation relating to the taking of marine mammals unless the state satisfies the standards necessary to assume management authority. (16 U.S.C. § 1379(a), (b)(1).) Congress quite simply left no room for the states to unilaterally supplement the federal regulation of marine mammals. (*Fouke Company v. Mandel* (D.Md. 1974) 386 F. Supp. 1341, 1359 [MMPA occupies the field of laws relating to the taking and importation of marine mammals].) The seasonal beach closure is thus preempted because it attempts to regulate within a field fully occupied by federal law.

C. The Seasonal Beach Closure Is Preempted Because It Stands as an Obstacle to the Purposes and Objectives of Congress

State law is also preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67.) When Congress passes legislation

aimed at achieving uniform rules and enforcement standards, state law which interferes with that purpose is preempted. (*Gade v. National Solid Wastes Management Assn., supra,* 505 U.S. at 102-103.) Here, Congress gave the federal government exclusive jurisdiction over the conservation and management of marine mammals. (*Florida Marine Contractors v. Williams, supra,* 378 F.Supp.2d at 1357-58, citing 16 U.S.C. § 1379(a).) The MMPA does not allow a state to regulate the taking of marine mammals unless it first satisfies the standards for assuming management authority under 16 U.S.C. § 1379(b)(1). Among other things, this process requires the state to implement a program that is consistent with the purposes, policies, and goals of this Act and with international treaty obligations. (16 U.S.C. § 1379(b)(1)(A).) A clear purpose of this system is to ensure uniformity and consistency in the nation's laws relating to the taking of marine mammals. The seasonal beach closure frustrates this uniformity and is thus preempted because it stands as an obstacle to the full purposes and objectives of the MMPA.

VI. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN RULING THAT STATE LAW PREEMPTS THE SEASONAL BEACH CLOSURE

In its statement of decision, the trial court declared that seasonal beach closure ordinance, the LCP amendment, and the Commission's coastal development permit "are void, unenforceable, and are preempted by the public's right to beach access acquired under the Coastal Act, the California Constitution,

and the terms of the legislation granting Children's Pool Beach to the City." AA 571, ln 5-9.

"If local legislation conflicts with state law, it is preempted by the state law and is void. A conflict exists when the local legislation contradicts state law." (*Reidy v. City and County of San Francisco* (2004) 123 Cal.App.4th 580, 587.) (internal citations omitted) Here, the trial court correctly ruled that state law preempted the seasonal beach closure because it conflicts with the Coastal Act, the California Constitution, and the terms of the Trust.

A. The Seasonal Beach Closure Is Preempted by the Coastal Act Because It Interferes with the Public's Right of Access Acquired by Use and Legislative Authorization

The Coastal Act generally promotes a policy of public access to the coast, but it provides special protection to access specifically granted by the Legislature or acquired by longstanding public use:

> Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

(Pub. Res. Code, § 30211.)

The City and the Commission are thus prohibited from undertaking or authorizing development which interferes with public access acquired through use or legislative authorization. Here, the seasonal beach closure is development[15]

[15] Development' means, on land, in or under water, the placement or erection of any solid material or structure; … change in the density or intensity of use of land, … change in the intensity of use of water, or of access thereto…" (Pub. Res. Code, § 30106.) There is no

which interferes with public access protected by Section 30211. It thus conflicts with state law and is accordingly preempted.

1. The Public Acquired the Right to Access Children's Pool Beach by Legislative Authorization

The state holds tidelands in trust for the public for navigation, fishing, commerce and other public purposes specified by the Legislature. (*Lane v. City of Redondo Beach* (1975) 49 Cal.App.3d 251, 256.) The state may grant tidelands to a municipality, subject to a public trust on the terms and conditions established by the Legislature. (*Atwood v. Hammond* (1935) 4 Cal.2d 31, 37-38.) "It is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished, and to take the necessary steps to free them from such burden." (*Marks v. Whitney* (1971) 6 Cal.3d 251, 260-261.)

In 1931, the Legislature granted Children's Pool Beach and its tidelands to the City of San Diego. The Legislature required the beach be devoted for public recreation, e.g. as a park, a bathing pool for children, a playground, etc. The Legislature amended the terms of the Trust once in 2009 to add a "marine mammal park" to the list of designated uses. 16 AR 4083-4084. In its present form, the Trust provides as follows:

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dispute that the seasonal beach closure qualifies as "development" as it involves the erection of a solid barrier, a change in the intensity of public use of the beach, and a change in public access to the sea.

> (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.
>
> (b) The absolute right to fish in the waters of the Pacific Ocean over said tidelands or submerged lands, with the right of convenient access to said waters over said lands for said purpose is hereby reserved to the people of the State of California.

(Stats. 1931, ch. 937, § 1, as amended by Stats. 2009, ch. 19.)

Subdivision (a) plainly grants the public access to the beach as a park, marine mammal park, bathing pool, playground, and other uses which support "the full enjoyment of such purposes." Subdivision (b) goes even further and reserves to the public an "absolute right to fish" at Children's Pool "with the right of convenient access [to the ocean] over [Children's Pool Beach]." The Legislature decided how the Children's Pool would be used to benefit the public trust when it granted title to the City. The public thus acquired its access rights from the plain language of this Legislative authorization.

2. The Legislature Never Restricted or Eliminated The Public's Right to Access Children's Pool Beach

The 2009 amendment reflects the Legislature's only modification of the original Trust to the City in 1931. The City requested this amendment to avoid the court-ordered disbursement of the seals and to allow the seals to continue sharing the beach with the public. The Legislature thus added another use, a marine mammal park, to those already enumerated in the Trust, and thus formally authorized the City's then existing policy. While the 2009 amendment codifies

joint use, the amendment did not restrict existing public access to the beach, nor did it allow the City to prohibit access for any of the other uses specified in the Trust. Even after the Trust was amended, the public continued to access the beach alongside the seals in accordance with the joint use policy. The seasonal beach closure defies the Legislature's longstanding support of public access to the beach and marks an unprecedented step in the history of the Children's Pool.

When the Legislature provides the public with specific coastal access rights, Public Resources Code section 30211 prohibits any development which interferes with that access. This is not a policy recommendation that must be balanced or considered – it is a mandatory instruction from the Legislature that the City and the Commission must obey. (*Grupe v. California Coastal Commission* (1985) 166 Cal.App.3d 148, 161, 183 ("Grupe") [Use of the word "shall" in Public Resources Code section 30212 makes the provision of public access to the shoreline "mandatory" in new developments]; *Marks v. Whitney, supra,* 6 Cal.3d 251, 260-261 [Legislature alone holds power to determine whether public trust uses should be modified or extinguished.]) For 85 years, the Legislature has clearly provided the public with specific access rights to the Children's Pool and Public Resources Code section 30211 protects the public from development that interferes with those rights.

The Commission argues that by adding "a marine mammal park" to the uses authorized by the Trust, the Legislature did more than just permit the City to let the seals remain on the beach. Citing to *Carstens v. California Coastal*

Commission, (1986) 182 Cal.App.3d 277 ("Carstens"), the Commission argues that public trust doctrine "does not prevent the state from preferring one trust use over another." (Commission Opening Brief at p. 32.) Thus, according to the Commission, the 2009 amendment also authorized the City to exclude public access to the beach in order to protect the seals.

Carstens is readily distinguishable as it involved a public utility's obligation under federal regulations to restrict public access to the San Onofre Nuclear Generating Station (SONGS), located on the federal enclave in Camp Pendelton. (*Carstens, supra,* 182 Cal.App.3d at p. 282.) The petitioner challenged Coastal Commission approval of an amended permit allowing the utility to erect an exclusionary fence on federal land above the mean high tide line. (*Id.* at pp. 288-289, 294, fn 15.) The court held that approval of the amended permit did not violate the public trust doctrine. (*Ibid.*) In contrast to the facts in *Carstens*, the Children's Pool Beach is not on a federal enclave and the City is not restricting access in order to comply with nuclear safety regulations. Further, unlike the project in *Carstens*, the seasonal beach closure here will not just indirectly impair access – it will directly prohibit access. (*Id.* at p. 294, fn 15.) Most importantly, *Carstens* (unlike this case) did not involve legislation granting public access and specifying the designated trust uses for the beach. It is one thing to say the default public trust doctrine for generic tidelands allows trustees to prefer one use over another. It is quite another thing to say a trustee may disregard the Legislature's decision to give the public access rights to Children's Pool Beach. *Carstens* does

not legitimize Appellants' interference with the public access rights acquired by the Trust from the Legislature and protected under Public Resources Code section 30211.

The Commission next asserts that the mandatory, e.g. "shall," language of Section 30211 is qualified by Section 30214 which provides that the "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…" (Pub. Res. Code, § 30214, subd. (a)(1)-(4).) First, Section 30211 is not just a "public access policy." It is a statute mandating that "[d]evelopment *shall* not interfere with the public's right of access to the sea where acquired through use or legislative authorization…" (Pub. Res. Code, § 30211.) In *Grupe v. California Coastal Commission, supra,* 166 Cal.App.3d 148, the appellate court confronted similar language in Public Resources Code section 30212, subdivision (a), which provides that "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. …" The court held that "section 30212, subdivision (a), is mandatory — it provides that access shall be provided in new development projects unless three specific exceptions apply." (*Grupe, supra,* 166 Cal.App.3d at p. 161.)

> As previously noted, section 30212, subdivision (a), of the Public Resources Code provides that public access "along the coast *shall* be provided in new development projects" (italics added) unless three narrow exceptions apply. This section constitutes a *statutory directive* that access *shall* be provided in connection with new development projects unless the Coastal Commission finds that one of the exceptions mentioned in the statute applies.

(*Grupe, supra,* 166 Cal.App.3d at p. 183.) (emphasis added)

Section 30211 is also mandatory as it provides that "development *shall not* interfere with access acquired by legislative authorization." Here, the statute applies because the seasonal beach closure is (1) development, (2) that interferes with public access rights, (3) acquired through use and legislative authorization. Appellants cannot avoid this clear statutory directive by treating it as merely a vague "policy" objective that can be disregarded in favor of other "policies."

Moreover, even if Section 30214 applied to public access protected by Section 30211, the seasonal beach closure goes well beyond a "time, place and manner" regulation. The law does not apply to just a portion of the beach, nor is it limited to certain times of day, or specific manners of usage. Rather, the seasonal beach closure **eliminates** the public's access to the **entire beach**, **in any manner**, **at all times of the day**, **for 42 percent of the year**. This is a "time, place, and manner" regulation in the same way that decapitation is a haircut.

The Legislature's 2009 amendment did not repeal or reduce the access rights the public held under the 1931 Trust. If the City and the Commission want to extinguish the longstanding public use of a man-made beach and modify the terms of the Trust, they must do what they did in 2009 and make their case to the

Legislature. Until the Legislature decides otherwise, the seasonal beach closure directly conflicts with the Trust and Public Resources Code section 30211, and is therefore preempted.

B. Alternatively, If the 2009 Amendment Is Construed To Allow the City to Exclude People from The Beach in Order To Protect Seals from Harassment, It Is Preempted by MMPA

According to the Commission and the City, the 2009 amendment to the Trust authorizes the City to protect the seals from harassment by closing public access to the beach. In other words, Appellants interpret the amended Trust as not just authorizing shared use by the seals and the public, but as empowering the City to use the beach as a harbor seal sanctuary, where public access is forbidden.

If the 2009 amendment to the Trust is interpreted to authorize closing the beach to protect seals from harassment, then that law "relates to" to the taking of marine mammals and thus falls within the broad scope of the MMPA's preemption statute. (16 § U.S.C. 1379(a).) In this regard, the trial court's implied finding that the 2009 amendment was preempted by the MMPA is bolstered by its express finding that there was "no showing that, prior to the California Legislature's 2009 enactment of the amendment to the 1931land trust consisting of the Children's Pool-Beach, to include in the list of uses and purposes 'a marine-mammal park for the enjoyment and educational benefit of children,' the Legislature, City of San Diego and/or the California Coastal Commission formally engaged the Secretary identified in 16 U.S.C.A. section 1379(a) and secured permission from said Secretary to amend the land trust to add 'a marine mammal park for the enjoyment

and educational benefit of children' to the 1931 land trust for the Children's Pool Beach." AA 571, ln 23 – 572, ln 3.

Insofar as the 2009 amendment to the Trust "relates to" the harassment of seals, it is preempted under Section 1379(a) of the MMPA. As such, the Trust reverts to its original language prior to the amendment, under which the seasonal beach closure would most certainly violate both the Trust and Public Resources Code section 30211.

VII. 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.

May 4, 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 13,614 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.

May 4, 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 May 4, 2017, I served copies of these document(s) as follows:

(1) ANSWERING BRIEF OF RESPONDENT FRIENDS OF THE CHILDREN'S POOL; and (2) RESPONDENT FRIENDS OF THE CHILDREN'S POOL'S REQUEST FOR JUDICIAL NOTICE

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)

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 May 4, 2017 in San Diego County, California.

BERNARD F. KING III