No. 02-700

In the Supreme Court of the United States

TURTLE ISLAND RESTORATION NETWORK, ET AL.,
PETITIONERS

v.

DONALD L. EVANS, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 609(b)(1) of the Department of Commerce Appropriations Act, Pub. L. No. 101-162, 103 Stat. 1037, prohibits the importation of shrimp or shrimp products that "have been harvested with commercial fishing technology which may affect adversely" endangered or threatened species of sea turtles. The issue presented by this case is as follows:

Whether the court of appeals correctly concluded that the State Department's regulations implementing Section 609(b)(1), which, *inter alia*, prohibit importation of shrimp harvested by vessels not equipped with certain turtle excluder devices, are based on a permissible interpretation of the statute.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 284 F.3d 1282. The July 19, 2000, opinion of the Court of International Trade (Pet. App. 39a-68a) is reported at 110 F. Supp. 2d 1005. The April 2, 1999, opinion of the Court of International Trade (Pet. App. 69a-101a) is reported at 48 F. Supp. 2d 1064.

JURISDICTION

The judgment of the court of appeals (Pet. App. 113a-114a) was entered on March 20, 2002. A petition for rehearing was denied on August 8, 2002 (Pet. App. 103a-111a). The petition for a writ of certiorari was

filed on November 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 609 of the Department of Commerce Appropriations Act, Pub. L. No. 101-162, 103 Stat. 1037 (found at 16 U.S.C. 1537 note) has two subsections. Subsection (a) calls upon the Secretary of State to initiate negotiations with foreign nations to develop treaties to protect specified species of sea turtles. Subsection (b) establishes limitations on the importation of shrimp as follows:

> (b)(1) **In general.**— The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).
>
> (2) **Certification procedure.**—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—
>
> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and
>
> (B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of

> sea turtles by United States vessels in the course of such harvesting; or
>
> (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

16 U.S.C. 1537 note.

2. As part of a national effort to protect endangered and threatened species of sea turtles, federal regulations have generally mandated since 1987 that shrimp fishermen install turtle excluder devices, or TEDs, in their trawl nets when operating in United States waters where there is a likelihood of capturing sea turtles. 52 Fed. Reg. 24,244 (1987).[1] TEDs are grid-like devices that are installed in shrimp trawl nets and are designed to minimize the possibility of injury or death to sea turtles by allowing them to escape from such nets. All parties agree that TEDs are not costly and, when used properly, are 97% effective at allowing sea turtles to escape from shrimp trawl nets.

In 1989, Congress enacted Section 609 and placed restrictions on the importation of shrimp harvested in ways that may harm sea turtles, including commercial trawl nets not equipped with TEDs. The State Department, pursuant to its delegation of authority to interpret Section 609 (56 Fed. Reg. 357 (1991)), has interpreted the phrase in Section 609(b)(1) and determined

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[1] The species of sea turtles covered by the regulations (loggerhead, leatherback, green, hawksbill and Kemp's ridley) are protected as either endangered or threatened species under the Endangered Species Act of 1973, 16 U.S.C. 1531-1544. See 50 C.F.R. 17.11; *Louisiana* v. *Verity*, 853 F.2d 322, 325 (5th Cir. 1988). These same five species are the subject of Section 609(a) and (b).

that harvesting with TEDs "does not adversely affect sea turtles" within the meaning of Section 609. 61 Fed. Reg. 17,343 (1996) (1996 Guidelines). Accordingly, in various guidelines developed to implement Section 609, the State Department has interpreted Section 609(b)(1) not to require the United States to prohibit the importation of shrimp and shrimp products harvested by trawlers equipped with TEDs, among other categories of importable shrimp, whether or not the exporting nation itself has been certified pursuant to Section 609(b)(2).

That interpretation is contained in the Guidelines implementing Section 609 issued on August 28, 1998, which are the subject of this litigation.[2] The 1998 Guidelines identify several categories of shrimp and shrimp products not subject to the import prohibition in Section 609(b)(1), including shrimp harvested by commercial trawl vessels using TEDs comparable in effectiveness to those required in the United States (TED-caught shrimp). 63 Fed. Reg. 46,095 (1998) ("[T]he harvesting of shrimp with TEDs does not adversely affect sea turtle species and * * * TED-caught shrimp is * * * not subject to the import prohibition created by Section 609(b)(1).").[3] In addition, "to address

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[2] This interpretation was initially published in the 1996 Guidelines. 61 Fed. Reg. at 17,342. For a 22-month period, the State Department was enjoined from implementing the 1996 Guidelines when the Court of International Trade held that the State Department's interpretation was inconsistent with Section 609. *Earth Island Inst.* v. *Christopher*, 942 F. Supp. 597 (1996). On appeal, that decision was reversed on jurisdictional grounds by the Federal Circuit. *Earth Island Inst.* v. *Albright*, 147 F.3d 1352, 1357 (1998).

[3] The 1998 Guidelines also exclude from the importation ban: shrimp harvested in an aquaculture facility in which the shrimp

concerns that have been raised about the effect of this determination on the conservation of sea turtle[s]," the Guidelines established special mechanisms for determining the comparability of foreign TEDs and protecting against fraud in the certification of shipments of shrimp imported under Section 609(b). *Ibid.*[4]

In the 1998 Guidelines, the State Department also announced that it would periodically review whether the Guidelines adversely affected its efforts to encourage other nations to adopt programs protecting sea turtles, and would "reassess the decision" if "evidence indicates that the decision has adversely affected sea turtle species, *e.g.*, by prompting foreign governments to abandon or limit country-wide TED programs or to fail to adopt such programs." 63 Fed. Reg. at 46,095. In addition, the Guidelines state that "[t]he Department has further decided to increase its efforts to protect and conserve sea turtles through the negotiation and implementation of multilateral agreements." *Ibid.*

3. In September 1998, petitioners brought this action challenging the 1998 Guidelines in the Court of International Trade, seeking both declaratory and injunctive relief. Petitioners claimed that Section 609 requires a nation to receive certification from the State

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spend at least 30 days prior to being harvested (aquaculture shrimp); shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the program described above, would not require TEDs, such as artisanal, or hand-drawn, nets (artisanal shrimp); and shrimp harvested in areas in which sea turtles are not found (cold-water shrimp). 63 Fed. Reg. at 46,096.

[4] In July 1999, the State Department issued revised guidelines implementing Section 609. 64 Fed. Reg. 36,946. The 1999 Guidelines were not revised in any way that affects the issue in this litigation.

Department before it may export even TED-caught shrimp, and that the 1998 Guidelines violate that requirement. On April 2, 1999, the Court of International Trade declared that the 1998 Guidelines are inconsistent with Section 609 insofar as they permit the importation of shrimp harvested with trawl gear from nations that have not first been certified pursuant to Section 609(b)(2). Pet. App. 69a-101a. Before entering judgment for petitioners, however, the court called for the submission of certain additional evidence. On July 19, 2000, after considering such evidence, the Court of International Trade refused to enjoin implementation of the Guidelines, finding that petitioners had submitted insufficient evidence of harm to sea turtles. *Id.* at 39a-68a. Both parties appealed.

4. a. The court of appeals reversed in part and affirmed in part. Pet. App. 1a-38a, 113a-114a. In particular, the court held that the State Department's Guidelines are a "permissible implementation" of Section 609(b). *Id.* at 2a. In so holding, the court looked to the text of the statute and determined that "[t]he plain language * * * provides no basis for embargoing shipments of shrimp which have *not* been harvested with commercial fishing technology that may harm sea turtles." *Id.* at 16a. Thus, "[b]ecause," the court found, "TED-caught shrimp have *not* been harvested with commercial fishing technology that may harm sea turtles, the statutory language does not support embargoing TED-caught shrimp from uncertified countries." *Ibid.* (emphasis added).

The court of appeals also explained that if the statute were interpreted always to require certification of nations under Section 609(b)(2), then the "harvested with commercial fishing technology" language of Section

609(b)(1) would be rendered superfluous. Pet. App. 16a. The court stated:

> We cannot see how the "harvested with commercial fishing technology" language could consistently be interpreted to permit import of some shrimp that have been harvested without adverse effect on sea turtles—such as aquacultured or hand-caught shrimp from uncertified countries—but to ban the import of other shrimp that have been harvested without adverse effect on sea turtles—such as TED-caught shrimp from uncertified countries.

Ibid.

The court of appeals rejected the argument that, because "other portions of the statute direct the Secretary of the State to negotiate with and certify nations," the embargo provision in Section 609(b)(1) necessarily applies to "entire nations as well." Pet. App. 17a. The court noted that "[o]ne negotiates with nations and imports shrimp, not vice versa." *Ibid.* Accordingly, the court found "nothing inherently insensible about applying the negotiation and certification provisions to nations on the one hand, and the embargo provisions to particular shipments of shrimp on the other." *Ibid.* The court also found "nothing in the legislative history to mandate a nation-by-nation approach" to the importation ban. *Id.* at 18a. Finally, the court found its conclusion supported by a comparison with other federal statutes that imposed an importation ban on a nation-by-nation basis when Congress intended to do so. *Id.* at 22a-23a.

Because the court of appeals concluded that the State Department's interpretation was supported by the text of Section 609, the legislative history, and an analysis of other statutory provisions, the court did not reach

petitioners' more "attenuated arguments on the wisdom of the government's implementation of section 609." Pet. App. 25a.

b. Judge Newman dissented. Pet. App. 27a-38a. Judge Newman concluded that the majority's interpretation was inconsistent with the purpose of Section 609(b), which she concluded—relying on legislative history—was to protect sea turtles while avoiding any disadvantage to domestic shrimpers. *Id.* at 30a-31a. In her determination, the State Department's "shipment-by-shipment approach" is inconsistent with that general legislative purpose because, she argued, that approach both weakens the incentive for countries to impose TED requirements and "removes the anticipated 'level playing field' for domestic interests." *Id.* at 33a.

5. The court of appeals denied rehearing. Pet. App. 103a-104a. Judges Gajarsa and Newman dissented from the denial of rehearing for essentially the same reasons as those in Judge Newman's dissent from the panel decision. *Id.* at 104a-111a.

ARGUMENT

The State Department has determined that the harvesting of shrimp with TEDs comparable in effectiveness to those required in the United States does not adversely affect sea turtles, and that TED-harvested shrimp are therefore not subject to the importation ban established by Section 609(b). The court of appeals in this case carefully reviewed and upheld that statutory interpretation. Its decision does not conflict with any decision of this Court or any other court of appeals, and its interpretation of the particular statutory provision Congress enacted to address the importation of shrimp and preservation of sea turtles presents no question of general importance warranting this Court's review.

1. Petitioners claim (Pet. 6) that Section 609 "compel[s] foreign nations to impose conservation requirements on their shrimp fleets comparable to those imposed on the U.S. fleet." That is incorrect. By its terms, Section 609(b)(1) provides for an embargo on the importation of only certain shrimp and shrimp products, *i.e.*, those "which have been harvested with commercial fishing technology which may affect adversely [certain] species of sea turtles." Section 609(b)(1) does not establish, much less compel, a ban on the importation of shrimp on a nation-by-nation basis. Indeed, as the court of appeals explained, reading the embargo to apply to "nations" would require a court to "interpolate words into the plain language of the statute, reading 609(b)(1) as an embargo on 'shrimp which have been harvested *from a nation that employs* commercial fishing technology which may affect adversely said species of sea turtles.'" Pet. App. 16a.

Nor is the nation-by-nation ban envisioned by petitioners compelled by Section 609(b)(2) of the statute. That section provides that the "ban on importation of shrimp or products from shrimp *pursuant to paragraph (1)* shall not apply" to nations which receive certification under Section 609(b)(2) (emphasis added). Thus, rather than transforming Section 609(b)(1) in the manner argued by petitioners, Section 609(b)(2) expressly *refers to* the embargo as set forth in Section 609(b)(1). Section 609(b)(2) also sets forth the criteria for obtaining certification, including a showing that the nation has adopted a regulatory program and has achieved a rate of incidental taking of sea turtles that are comparable to those of the United States. But the criteria for *national* certification in no way alter the terms of the embargo in Section 609(b)(1) on the importation of

shrimp or shrimp products that have been *harvested* by specified means.

Petitioners argue (Pet. 23) that it is not possible to read Section 609(b)(1) as embargoing shipments, without reference to Section 609(b)(2), which creates exceptions to that embargo applicable only to "nations." To the contrary, there is nothing illogical about embargoing a product and then enforcing that embargo by addressing the common unit of importation, *i.e.*, shipments. See Pet. App. 17a ("We find nothing inherently insensible about applying the negotiation and certification provisions to nations on the one hand, and the embargo provisions to particular shipments of shrimp on the other.").

That reading does not, as petitioners suggest (Pet. 23), render the certification mechanism in Section 609(b)(2) a nullity. The benefits of obtaining pre-certification for an entire fleet of vessels, so that individual shipments are not regularly inspected and required to carry individual certifications, provide an incentive for most nations to seek certification as the primary means of gaining access to United States markets. Indeed, only two uncertified nations (Australia and Brazil) have sought to export shipments of TED-caught shrimp to the United States. Brazil has been certified at times and continues to enforce the use of TEDs throughout its substantial northern fishery, and Australia requires TEDs in its large northern prawn fishery. C.A. App. 920-925. Other nations exporting mechanized, trawl-caught shrimp are certified under Section 609(b)(2). 67 Fed. Reg. 32,078 (2002) (certification of 41 nations and Hong Kong).

At the same time, as the court of appeals concluded (see Pet. App. 16a), petitioner's proposed interpretation has the effect of rendering superfluous the phrase in

Section 609(b)(1) "harvested with commercial fishing technology which may affect adversely" covered sea turtles. And, as this Court has repeatedly emphasized, "legislative enactments should not be construed to render their provisions mere surplusage." *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997); accord *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citing cases).

2. The court of appeals' conclusion that the State Department's Guidelines are based on a "permissible implementation of the statute" (Pet. App. 2a) is bolstered by the deference that courts generally apply to an implementing agency's interpretation of an Act of Congress. While Section 609(b)(1) unambiguously establishes an embargo against shrimp products harvested in certain ways, it is undeniably silent as to which particular methods of harvest may "affect adversely" threatened sea turtles, and the State Department's Guidelines are designed to fill that gap. See *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

As noted above, the State Department's Guidelines determine which of various technologies do not adversely affect sea turtles, including, *inter alia*, the use of hand-retrieved nets (or other artisanal means), trawls in waters where no turtles are found, aquaculture, and TEDs that are at least comparable in effectiveness to those required in the United States. See 63 Fed. Reg. at 46,095; see also 64 Fed. Reg. 36,946 (1999). Petitioners provide no basis for a court to second-guess

the agency's determination that shrimp harvested in nets with TEDs—which are 97% effective in allowing sea turtles to escape—have not been "harvested with commercial fishing technology which may adversely affect" sea turtles.

Indeed, although the court of appeals did not need to reach the issue of "how much deference" the courts owe the challenged agency determination (Pet. App. 25a), the regulations at issue in this case are entitled not only to the typical deference owed to agency interpretations of silent or ambiguous statutory language, but to the heightened deference owed to executive interpretations in the realm of foreign affairs. See *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 241 (1986); see also *Humane Soc'y* v. *Clinton*, 236 F.3d 1320, 1329 (Fed. Cir. 2001). The Guidelines expressly state that they were issued pursuant to the Executive's "foreign affairs function." 63 Fed. Reg. at 46,097.[5]

3. Where, as here, the statute's language is clear, resort to legislative history is not necessary. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). But in any event, the court of appeals examined the legislative history of Section 609 and found no support for petitioner's

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[5] The fact that the State Department had previously interpreted the statute in a different manner does not compel a different conclusion. See Pet. 17 n.6. As this Court has explained, "[a]n initial agency interpretation is not instantly carved in stone." *Chevron*, 467 U.S. at 863. Rather, the agency "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-864. This Court defers to agency interpretations where, as here, agencies provide reasoned analysis justifying their changed positions. *E.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991); *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 617-618 (1991); *Robertson* v. *Methow Valley Citizen's Council*, 490 U.S. 332, 335-336 (1989).

position that Congress intended "to mandate a nation-by-nation approach." Pet. App. 18a. At the same time, the limited legislative history underscores that Section 609 delegated to the administering agency the task of determining what categories of shrimp should be embargoed. As Senator Breaux, one of the bill's sponsors, noted in the Senate debate, it would be up to the State Department in implementing the Act to "identify[] * * * precisely what sort of commercial fishing operations may meet this test." 135 Cong. Rec. 15,509 (1989).

As the court of appeals noted, the legislative history also indicates that Congress was focused on "protecting the domestic shrimp industry, not the sea turtle, when it enacted Section 609." Pet. App. 21a. But the court of appeals' decision does not, as petitioners suggest (Pet. 6), frustrate that objective. The market for domestic shrimpers is overwhelmingly the United States market, which domestic shrimpers share with shrimpers from other nations. The court of appeals' interpretation of Section 609(b)(1) ensures that *all* shrimpers, both foreign and domestic, must meet comparable environmental standards for sea turtle protection with respect to shrimp sold in the United States.

4. Petitioners claim (Pet. 17-21) that the court of appeals' decision and State Department regulations improperly subordinate domestic law to international pressures. That is incorrect. In particular, the State Department did not, as petitioners argue (Pet. 2), reach its interpretation of Section 609(b)(1) based on pressure resulting from the decision of the World Trade Organization (WTO) Appellate Body.

The State Department's determination that Section 609(b)(1)'s embargo applies only to shrimp caught with certain technologies (61 Fed. Reg. at 17,342) was first issued before any international challenge was filed. It

was also issued almost two and a half years before the WTO's Appellate Body issued a report agreeing with the United States that Section 609 is covered by an exception in the General Agreement on Tariff and Trade (GATT) for measures relating to conservation of exhaustible natural resources, but faulting the application of the import restriction to TED-caught shrimp from uncertified countries as contributing to its findings of unjustifiable discrimination. WTO, United States-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998).

Moreover, contrary to petitioners' assertion (Pet. 10), the 1998 Guidelines were not issued in anticipation of the WTO Appellate Body's report, but rather were issued after the Federal Circuit vacated an earlier Court of International Trade ruling setting aside the State Department's 1996 Guidelines. See note 2, supra. The court of appeals' decision permitted the State Department to resume implementation of the current interpretation of Section 609(b), as the State Department had advocated at all levels of judicial review since implementing the 1996 Guidelines.

Petitioners point (Pet. 19) to an early State Department interpretation of Section 609 that required all nations within the Caribbean to obtain certification before exporting any trawl-harvested shrimp into the United States. But those regulations were limited to the wider Caribbean. In the earliest litigation before it, the Court of International Trade ruled that Section 609 had *global* application, and struck down the State Department's Caribbean-based regulations.[6] *Earth Island*

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[6] See *Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl*

Inst. v. *Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996). In promulgating the 1996 Guidelines after that decision (which was not appealed), the State Department comprehensively reviewed its interpretation of Section 609 to assure that implementation of the embargo provisions was consistent with Section 609(b) and reasonable in all other ways. The 1996 Guidelines were in no way merely a "pragmatic political accommodation" (Pet. 19), but rather a carefully considered response to the Court of International Trade's decision.

5. Petitioners question (Pet. 2-3, 28-30) the wisdom of the State Department's determination from the standpoint of protecting sea turtles. But the agency has already considered and rejected petitioners' policy argument in adopting its regulations, and that argument provides no reason for second-guessing the agency's statutory interpretation. In any event, petitioners' argument is based on the supposition (Pet. 22-23) that if the United States allows importation under Section 609(b)(1) on a shipment-by-shipment basis, nations will no longer seek certification under Section 609(b)(2) that they have comparable TEDs programs. But despite the opportunity for uncertified nations to import TED-caught shrimp on a shipment-by-shipment basis pursuant to the 1996 Guidelines, none of the approximately 18 nations that had established a certified TED program by 1996 has chosen to abandon or limit its program, and some Central American nations actually expanded their TEDs programs. See 63 Fed. Reg. at 46,095.

Fishing Operations, 58 Fed. Reg. 9015 (1993); *Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 56 Fed. Reg. 1051 (1991).

By contrast, during the 22-month period when the Court of International Trade's prohibition on importing shrimp from any uncertified nation was in effect (from October 1996 until August 1998, when the 1998 Guidelines were issued), only two new countries, China and Nigeria, applied for and became certified for the first time. 62 Fed. Reg. 4826 (1997). China was certified due to its use of fishing gear that does not harm sea turtles, and, Nigeria, which was certified as having adopted a comparable TEDs program, had never expressed any interest in foregoing such a program in favor of exporting individual shipments of TED-caught shrimp. Brazil also was recertified. *Id.* at 19,157. Nigeria, Brazil, and Venezuela subsequently lost certification in May 1998, during the period when the Court of International Trade's broader embargo against uncertified nations was in effect. 63 Fed. Reg. at 30,550.[7]

Furthermore, there are still incentives for nations to seek certification under Section 609(b)(2), even though shrimp also may be imported into the United States on a shipment-by-shipment basis. Nations may be induced to implement a national regulatory program comparable to the United States' as a result of negotiation with the State Department, pursuant to Section 609(a). Nations may independently impose TEDs programs to protect sea turtles, or even simply to be seen as protecting sea turtles to achieve certain standing in the international community. Nations may seek certification to avoid the additional regulatory burdens and uncertainty of shipment-by-shipment inspection of shrimp exports, and the need for a government official to attest to the accompanying certification form (DSP-

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[7] Venezuela and Nigeria were eventually recertified in August, 1998. 63 Fed. Reg. at 44,499.

121). C.A. App. 107. In addition, the record supports the State Department's conclusion that as individual harvesters "become familiar with the advantages of using TEDs, * * * skepticism in foreign nations about TEDs technology will lessen and the number of country-wide TEDs programs may increase." *Ibid.*

Petitioners rely (Pet. 22-23, 29) on a letter from the Assistant Administrator for Fisheries of the National Marine Fisheries Service (NMFS), opining that the current Guidelines will be less effective than the Court of International Trade's interpretation. The Assistant Administrator's statement expressed views on a draft letter responding to commenters' concerns about the proposed 1998 regulations, and merely reflected a cautionary concern that "[t]he 'shipment-by-shipment' authorization *may* also result in some certified nations abandoning the comprehensive programs they now have in place." C.A. App. 97 (emphasis added). The letter notably predates issuance of the 1998 Guidelines; the State Department considered and addressed NMFS's concerns in the 1998 Guidelines. 63 Fed. Reg. at 46,095.[8]

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[8] Petitioners also rely on the brief of amici Dr. Paladino, *et al.* The harms predicted in the Paladino brief are also without record support, including with respect to the asserted threat posed to sea turtles in waters plied both by trawlers that are equipped with TEDs and trawlers that are not. Indeed, NMFS found that, in the United States fisheries in 1987, "the rate of sea turtle capture is relatively small," based on reports of federal observers on board trawl vessels that only 884 turtles were captured in 27,578 hours of observed trawling. 52 Fed. Reg. at 24,244 (1987). The mortality figure cited by the Paladino brief is drawn from a draft, unpublished 1990 study, and was dropped from the final version. Moreover, the figure predates the first Guidelines issued by the State Department and the multi-nation effort to reduce sea turtle destruction by adopting comprehensive TED regimes.

6. Petitioners seek to engraft (Pet. 4, 16, 28-29) Section 609 onto the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, in order to secure a heightened level of judicial review for a straightforward issue of statutory interpretation. But Section 609 is not part of the ESA. Rather, Section 609 was originally enacted as an appropriations rider to the Department of Commerce Appropriations Act, Pub. L. No. 101-162, 103 Stat. 988. Although placed as a footnote to the ESA in the United States Code by the Office of Law Revision Counsel, its placement has not been enacted by Congress into positive law, see 1 U.S.C. 204(a); 1 U.S.C. 204 table. Absent such congressional action, this Court will not infer congressional intent from the location of a statutory provision in the Code nor the organization of statutory provisions therein. See *United States* v. *Welden*, 377 U.S. 95, 98 n.4 (1964); *Warner* v. *Goltra*, 293 U.S. 155, 161 (1934).[9]

Moreover, notwithstanding the threatened status of sea turtles, Section 609 was not designed to "halt and reverse the trend toward species extinction, whatever the cost." Pet. 28 (quoting *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 184-185 (1978)). Rather, it reflects a measured approach to the particular issue of the importation of shrimp from abroad in light of the impact that certain types of harvesting may have on sea turtles. As discussed above, the court of appeals in this case properly construed the text of Section 609 and concluded that the State Department's interpretation

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[9] Accordingly, the Federal Circuit has held that challenges to implementation of Section 609(b) are properly maintained under the Administrative Procedure Act, 5 U.S.C. 701-706, and not as ESA citizen suits. See *Earth Island Inst.* v. *Albright*, 147 F.3d at 1357.

of the statute is a permissible one. Further review in this Court is not warranted.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] As the court of appeals concluded, because the agency's construction of Section 609 is permissible, petitioners' request for fees and injunctive relief must be denied. See Pet. App. 25a.