No. 07-1239

In the Supreme Court of the United States

DONALD C. WINTER, SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court found a likelihood that the Navy failed to comply with the National Environmental Policy Act (NEPA) and preliminarily enjoined the Navy's use of mid-frequency active (MFA) sonar during training exercises that prepare Navy strike groups for worldwide deployment. The Chief of Naval Operations concluded that the injunction unacceptably risks the training of naval forces for deployment to high-threat areas overseas, and the President of the United States determined that the use of MFA sonar during these exercises is "essential to national security." The Council on Environmental Quality (CEQ), applying a longstanding regulation, accordingly found "emergency circumstances" for complying with NEPA without completing an environmental impact statement. The Ninth Circuit nevertheless sustained the district court's conclusion that no "emergency circumstances" were present and affirmed the preliminary injunction. The questions presented are:

1. Whether CEQ permissibly construed its own regulation in finding "emergency circumstances."

2. Whether, in any event, the preliminary injunction, based on a preliminary finding that the Navy had not satisfied NEPA's procedural requirements, is inconsistent with established equitable principles limiting discretionary injunctive relief.

PARTIES INVOLVED

Petitioners are Donald C. Winter, Secretary of the Navy; U.S. Department of the Navy; Carlos M. Gutierrez, Secretary of Commerce; National Marine Fisheries Service; William Hogarth, Assistant Administrator for Fisheries of the National Oceanographic and Atmospheric Administration; and Vice Admiral Conrad C. Lautenbacher, Jr., Administrator of the National Oceanographic and Atmospheric Administration.

Respondents who were plaintiffs-appellees below are Natural Resources Defense Council, Inc.; International Fund for Animal Welfare; Cetacean Society International; League for Coastal Protection; Ocean Futures Society; and Jean-Michel Cousteau.

Respondent California Coastal Commission was intervenor-appellee below.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulations: Page

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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The Solicitor General, on behalf of petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion and order of the court of appeals (App. 1a-90a, 91a-95a) are not yet reported; a prior opinion and order (App. 171a-174a, 175a-194a) are reported at 508 F.3d 885 and 502 F.3d 859. The district court's orders (App. 96a-137a, 150a-170a, 195a-218a) are reported at 527 F. Supp. 2d 1216 and 530 F. Supp. 2d 1110 and available at 2007 WL 2481037. Other orders of the district court (App. 138a-144a, 145a-149a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to the petition (App. 358a-365a).

STATEMENT

The U.S. Navy has conducted training exercises using mid-frequency active (MFA) sonar within the Southern California Operating Area (SOCAL) for over 40 years. That historical practice has taken on added significance in light of ongoing hostilities and developments in submarine technology. The Navy scheduled a series of up to 14 certification exercises, from February 2007 through January 2009, in SOCAL to prepare naval strike groups for deployment to the western Pacific and Middle East. The use of MFA sonar to detect submarines is an essential element of those exercises, which train the thousands of military personnel in a strike group to operate as an integrated unit in simultaneous air, surface, and undersea warfare. The Navy has completed seven of the planned exercises (another exercise is underway) in compliance with the statutes that provide substantive protection to marine mammals: the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361 *et seq.*, and the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* Those exercises, like those over the past 40 years, have produced no evidence of sonar-related harm to any marine mammal. The President has determined that the exercises using MFA sonar are "essential to the national security." The Ninth Circuit nevertheless affirmed a preliminary injunction barring use of

MFA sonar in critical respects based on a finding of a violation of the procedural provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

1. a. The Navy deploys forces in strike groups that include either an aircraft carrier (with an air wing) or an amphibious assault ship (with a Marine expeditionary unit) accompanied by three to five other ships. App. 8a n.6. Each ship trains separately before a strike group is organized but must also complete integrated training as part of the strike group to enable the group's thousands of Sailors and Marines to function effectively as a single combat force. App. 8a-9a & n.6, 320a, 342a-343a. The Composite Training Unit Exercises (COMPTUEXs) and Joint Task Force Exercises (JTFEXs) at issue in this case train strike groups in the integrated and simultaneous use of a broad range of air, surface, and sub-surface warfare skills requiring close coordination of all strike-group assets. The exercises attempt to replicate with live opposition forces the real-world conditions that strike groups face while performing military missions and defending the fleet. *Ibid.*; E.R. 76, 103 (C.A. No. 07-56157).

The complexity of integrating the efforts of thousands of personnel to make the exercises a meaningful simulation of real-world military situations is substantial. The exercises are conducted under "austere, hostile conditions" (E.R. 60) that "stress every aspect of strike group performance" through complex battle problems and advanced, unscripted war games (App. 342a-344a) in order to hone the skills needed to "examine and prioritize every potential threat, balance competing demands of specific warfare commanders, and apportion limited assets to counter threats," while executing military missions and maintaining "force protection." E.R. 70; see E.R. 59-60, 65-66, 69-70.

The only opportunity for the Navy's Pacific Fleet strike groups to conduct such pre-deployment training is in COMPTUEX and JTFEX exercises in SOCAL. App. 271a, 342a; E.R. 70, 1155. SOCAL is the only complex on the west coast containing all land, air, and at-sea bases (including an instrumented range on the ocean floor and amphibious landing areas) necessary to train air, sea, and undersea forces simultaneously in an integrated manner. 73 Fed. Reg. 4190 (2008); E.R. 65-66, 68, 104-105; App. 182a, 235a, 327a-328a, 337a.

b. Anti-submarine-warfare training, including the use of MFA sonar, is a critical aspect of the exercises. App. 9a. The Navy continuously deploys strike groups to high-threat areas in the western Pacific and Middle East where modern quiet-running diesel-electric submarines are operated by the Nation's potential adversaries. E.R. 1148, 1151; App. 270a-271a. MFA sonar is a strike group's *only* effective means to detect diesel-electric submarines before they close within weapons range, and such timely detection "is essential to U.S. Navy ship survivability." App. 269a-271a, 274a, 277a; see E.R. 1144-1147; 73 Fed. Reg. at 4190.

MFA sonar operations are complex and require constant training to achieve and maintain combat proficiency and effectiveness. App. 266a-281a, 356a; E.R. 1149, 1154. Such training in real-world conditions is necessary to coordinate the efforts of a carrier or amphibious assault ship, its escort ships, and other assets to defend themselves against hostile submarines while simultaneously conducting both offensive and defensive air, sea, and amphibious operations. App. 270a-271a, 279a-285a; E.R. 1148-1150.

2. In preparation for the current series of COMPTUEXs and JTFEXs, the government took a number of actions to comply with environmental statutes.

a. In October 2006, the Navy determined that the MFA sonar component of the exercises would not "affect" California's coastal zone and submitted a "consistency determination" to the California Coastal Commission pursuant to the Coastal Zone Management Act of 1972 (CZMA). App. 29a; 16 U.S.C. 1456(c)(1)(A) and (C); 15 C.F.R. 930.41.

b. On January 23, 2007, the Deputy Secretary of Defense—pursuant to 16 U.S.C. 1371(f) (Supp. V 2005) and after consultation with the Department of Commerce—issued a two-year National Defense Exemption (NDE II) from the MMPA for certain military readiness activities, including MFA sonar use during the exercises at issue here, based on his determination that the exemption was "necessary for the national defense." App. 219a-220a. The exemption requires the Navy to comply with 29 marine-mammal-protective measures developed in consultation with the National Marine Fisheries Service (NMFS), the component of the Department of Commerce with responsibility for implementing the MMPA's protections for marine mammals such as whales and other cetaceans. App. 220a-230a.

c. On February 9, 2007, NMFS issued a biological opinion (E.R. 768-952) under the ESA, which concluded that, while MFA sonar exposure from the SOCAL exercises might harass members of threatened or endangered species, it is not likely to jeopardize the continued existence of any listed species. E.R. 906-907; 16 U.S.C. 1536(a)(2). NMFS further determined that it did "not expect any [such] species to be injured or killed as a result of exposure" and exercised its statutory authority to issue an "incidental take statement," subject to several conditions, that authorizes the Navy to "take" listed species incidental to MFA sonar use. E.R. 906-910; see 16 U.S.C. 1536(b)(4)(iv) and (*o*)(2).

d. Finally, in February 2007, the Navy issued an environmental assessment (EA) under NEPA for up to 14 planned exercises in SOCAL through January 2009. See E.R. 44-336; E.R. 339-635 (EA appendices). The Navy had initiated an environmental impact statement (EIS) in late 2006 to analyze the environmental impacts of *all* future Navy activities in SOCAL (including exercises involving MFA sonar). See 71 Fed. Reg. 76,639 (2006). The draft EIS is scheduled for release in April 2008 and the final EIS in January 2009. App. 235a-237a; U.S. Navy, *SOCAL EIS* <http://www.socalrangecomplexeis.com/GetInvolved.aspx>.

The 293-page EA comprehensively evaluated scientific evidence and the results of computer modeling to predict the effect of MFA sonar on marine mammals. That model defined "Level A" harassment as an action that "injures or has the significant potential to injure a marine mammal" in the "slightest" degree, including any permanent hearing loss (known as a permanent threshold shift (PTS)). E.R. 209-211, 232-233. The model defined "Level B" harassment as an action that disturbs a marine mammal by disrupting its natural behavior patterns, including actions predicted either to cause short-term hearing loss (TTS) or to disrupt temporarily a mammal's behavior without hearing loss (sub-TTS). *Ibid*. "All level B harassment" involved "short term and temporary" harassments that would be "highly unlikely" to cause "behavioral patterns [to be] abandoned or significantly altered." E.R. 232; cf. E.R. 222. The model intentionally "over-estimate[d]" the number of harassing exposures by assuming that marine mammals were evenly distributed throughout SOCAL and would not move to avoid sonar exposure, and that sonar use would proceed without the Navy's mitigation measures. E.R. 231-233.

Using those assumptions, the model predicted roughly 80,000 annual sub-TTS exposures (short-term behavioral disruptions with no hearing loss), nearly 79,000 of which involved various non-endangered, non-threatened dolphin species, which travel in large pods and are easily detected and protected with the Navy's NDE II mitigation measures. E.R. 245, 400; see E.R. 244, 250-252, 254, 256. The assessment further predicted 274 annual non-injurious exposures for non-endangered, non-threatened beaked whales: 13 TTS and 261 sub-TTS exposures. E.R. 243, 246, 257, 400. The model's only predicted injuries to marine mammals were eight annual exposures of permanent hearing loss (PTS) for common dolphins, which the Navy's mitigation measures would be effective in preventing. E.R. 245, 400.

The EA explained that, while its "modeling predicts [only] non-injurious Level B exposures" for beaked whales, the EA tabulated those exposures as non-lethal "Level A" exposures (E.R. 400-401 & n.**) to identify them separately as a "potential injury." E.R. 224, 243, 246, 257. The EA's "total" of 282 annual Level A exposures thus reflects an estimate of eight annual injury-level exposures for common dolphins (without mitigation measures) and 274 annual non-injurious exposures for beaked whales. E.R. 400-401 & n.**. To provide context, commercial fishing caused approximately 650,000 marine-mammals deaths annually in the 1990s with over 6000 annual deaths in U.S. fisheries alone. E.R. 1086-1087.

Based on its final EA, the Navy determined that its exercises from February 2007 through January 2009 would not have a significant impact on the environment and, accordingly, that NEPA did not require an EIS for those exercises. E.R. 63, 642; see E.R. 638-645. That conclusion parallels the historical pattern in SOCAL. Over the last 40

years, the Navy has employed MFA sonar systems using the same frequency and intensity (*i.e.*, the decibel level of the sonar source) as those used today and, since 1992, the number of training hours in SOCAL has declined. App. 268a-269a, 273a-274a; E.R. 66, 779, 876. There were no documented incidents of harm, injury, or death to marine mammals resulting from exposure to MFA sonar in SOCAL in those 40 years, nor were there any mass-stranding incidents or population-level effects attributable to MFA sonar in SOCAL. App. 274a-275a; E.R. 876, 1052-1053, 1074, 1084-1085, 1136-1137.

3. a. On March 22, 2007, respondents filed suit in the Central District of California, seeking to declare the SOCAL exercises in violation of NEPA, the CZMA, and the ESA, and to enjoin the Navy's use of MFA sonar. E.R. 1157-1203.

The district court issued a preliminary injunction on August 7, 2007, concluding that respondents would likely prevail on their NEPA and CZMA claims (but not their ESA claim) and enjoining all MFA sonar use in the planned SOCAL exercises. App. 200a-218a. The court concluded that such sonar use would create a "near certainty" of irreparable harm to the environment, App. 217a, relying on the Navy EA's prediction of approximately 170,000 marine-mammal harassment incidents over the two-year exercise period, including 8000 instances of temporary hearing loss and what the court described as "466 cases of permanent injury to beaked and ziphiid whales." App. 204a, 206a-207a.

b. The Ninth Circuit stayed the preliminary injunction pending appeal, concluding that the district court "did not give serious consideration to the public interest" in national defense at a time of war. App. 180a-183a. Another panel remanded the case on November 13, 2007, directing the district court "to narrow its injunction so as to provide miti-

gation conditions under which the Navy may conduct its training exercises." App. 174a. That panel concluded that some form of preliminary injunctive relief would be appropriate based on what it determined to be respondents' likelihood of success on their NEPA and CZMA claims, the "possibility of irreparable injury," and a balance of hardships that would tip in respondents' favor "if a properly tailored injunction is issued." App. 172a.

c. On January 3, 2008, the district court issued a new preliminary injunction. App. 150a-170a. The court restated its conclusions regarding respondents' likelihood of success on their CZMA and NEPA claims, App. 154a-163a, and irreparable harm, and determined that the balance of hardships favored an injunction and that the "public interest outweighs the harm [the Navy] would incur (or the public interest would suffer)" from restricted sonar use. App. 163a-164a.

The court accordingly imposed a series of restrictions on sonar use, which it modified on January 10, 2008. App. 138a-149a. Of particular relevance here, the court ordered that the Navy (1) cease sonar transmissions whenever a marine mammal is spotted within 2200 yards (1.25 miles) of any sonar source, and (2) reduce sonar power by six decibels (75%) whenever the Navy detects "significant surface ducting," an environmental condition characterized by a mixed layer of constant water temperature extending at least 100 feet from the surface, whether or not a marine mammal is present. App. 139a-140a, 142a-143a, 284a-285a, 297a.

The Chief of Naval Operations (CNO), who is responsible under 10 U.S.C. 5062 for organizing, training, and equipping the Navy, determined that those restrictions unacceptably risk naval training, the timely deployment of

strike groups, and national security. App. 341a-347a.[1] The 2200-yard shut-down requirement "crippl[es]" the Navy's ability to conduct realistic pre-deployment training and to assess a strike group's capabilities. App. 332a, 344a-346a, 353a-357a; App. 269a-271a, 279a-285a. Similarly, a 75% power-down requirement "dramatically reduce[s]" the likelihood of detecting a submarine, App. 284a, and the corresponding reduction in detection range prevents strike groups from conducting sonar operations to detect a submarine before it is positioned to attack. App. 279a-285a, 354a-356a; cf. E.R. 1147-1151. Training in significant surface ducting is "critical" because submariners exploit the condition by hiding below the duct's thermocline where the detection capability of even full-power sonar is reduced. App. 299a-300a, 333a. Moreover, anti-submarine warfare is a high-stakes cat-and-mouse game that may span days and "require[] large teams of personnel working in shifts around the clock." App. 278a, 344a. As a result, the loss of sonar-tracking capability during the integrated air, surface, and subsurface training can negate the effectiveness of the entire exercise, unacceptably risking national security and the Navy's ability to deploy adequately trained strike groups. App. 345a, 354a-356a; see App. 314a-325a.

4. Petitioners appealed and sought a stay of the aspects of the injunction just described. Meanwhile, the district court's CZMA- and NEPA-based injunction prompted a series of emergency actions by the Executive pursuant to statutory and regulatory powers.

On January 15, 2008, the President exercised his express authority under the CZMA to exempt a federal activity from CZMA compliance if he finds it to be "in the para-

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[1] Unredacted copies of the classified declarations of the CNO and other naval officers have been lodged with the Court.

mount interest of the United States." 16 U.S.C. 1456(c)(1)(B); see App. 231a-232a. The President determined that "the COMPTUEX and JTFEX, including the use of mid-frequency active sonar in these exercises, are in the paramount interest of the United States," and that, in light of the district court's injunction, an exemption was necessary "to ensure effective and timely training of the United States naval forces" because compliance would "undermine the Navy's ability to conduct realistic training exercises that are necessary to ensure * * * combat effectiveness." *Ibid*. The President accordingly issued the exemption to "enable the Navy to train effectively and to certify * * * strike groups for deployment" in support of operational and combat activities "essential to national security." *Ibid*.

Contemporaneous with the President's action, the Council on Environmental Quality (CEQ) authorized alternative arrangements for NEPA compliance in "emergency circumstances," pursuant to 40 C.F.R. 1506.11 and after extensive consultation with the Navy and NMFS and reviewing relevant documentary materials. App. 233a-249a. Noting that NMFS had determined that the Navy's SOCAL exercises were not expected to injure or kill marine mammals or cause any "adverse population level effects for any * * * marine mammal populations" (App. 255a, 258a), and that the next SOCAL exercise was imminent, CEQ concluded that "emergency circumstances" warranted "alternative arrangements for compliance with NEPA" through enhanced environmental-assessment and public-participation measures until the Navy's ongoing SOCAL EIS is completed. App. 240a-241a, 247a-248a. The Navy issued a decision accepting CEQ's alternative arrangements. 73 Fed. Reg. at 4189.

5. The court of appeals remanded to permit the district court to consider the Executive's intervening actions. App. 7a. After partially staying its preliminary injunction to permit the January 2008 exercise to proceed, the district court denied petitioners' motion to vacate the injunction. App. 96a-137a. The court questioned the constitutionality of the President's exemption under the CZMA because it believed the exemption rendered the court's earlier rulings advisory. App. 126a-135a. Rather than decide that question, however, the court held that its preliminary injunction remained an appropriate remedy for a NEPA violation alone: The court concluded that CEQ's approval of alternative NEPA arrangements under 40 C.F.R. 1506.11 was invalid because its injunction restricting strike-group training was not a "sudden, unanticipated event[]" giving rise to "emergency" circumstances under what the court regarded as "the plain language of the regulation." App. 97a, 112a-122a.

6. The court of appeals affirmed. App. 1a-90a. It likewise did not reach the validity of the President's actions under the CZMA, and it purported not to "adjudicate the meaning of the word 'emergency'" under CEQ's regulation. App. 4a n.3, 45a n.41. Instead, while recognizing that not all definitions of "emergency" supported the district court's conclusion, it held that the district court did not "abuse its discretion or rely on an erroneous legal premise in determining that CEQ's broad interpretation of 'emergency circumstances' was not authorized by 40 C.F.R. § 1506.11." App. 45a n.41, 56a. With CEQ's alternative NEPA arrangements thus put aside, the court affirmed the district court's conclusion that respondents demonstrated a likelihood of success on the merits of their NEPA claim that an EIS was required. App. 60a-74a.

The court of appeals further held that the district court properly issued preliminary injunctive relief because respondents had shown a "possibility of irreparable injury" to marine mammals, App. 74a-77a, and because, in its view, the Navy failed to prove that the injunction would prevent it from effectively training or certifying its strike groups for deployment, App. 78a-87a. While noting that "there remains the possibility" the Navy would be unable to certify its strike groups because of the injunction, the court concluded the district court did not err in concluding that the balance of hardships tipped in favor of maintaining the injunction. App. 88a-89a.

Nonetheless, in view of the "importance of the Navy's mission" and "the representation by the Chief of Naval Operations that the district court's preliminary injunction in its current form will 'unacceptably risk' effective training and strike group certification," App. 93a, the court *sua sponte* granted a temporary partial stay from the injunction's 2200-yard mandatory shutdown and surface-ducting power-down requirements. App. 93a-95a. That stay will expire, however, upon this Court's disposition of this case. App. 95a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has affirmed a preliminary injunction that jeopardizes the Navy's ability to train Sailors and Marines for wartime deployment during a time of ongoing hostilities. The decision poses substantial harm to national security, and improperly overrides the collective judgments of the political Branches and the Nation's top naval officers regarding the overriding public interest in a properly trained Navy. The applicable statutes do not direct the counterintuitive result that vital military exercises must yield to a preliminary determination that procedural errors

under NEPA have occurred. The relevant environmental statutes affording substantive protection to marine mammals all have been complied with or have exceptions that were properly invoked. CEQ's NEPA regulations likewise provide a safety valve for emergency circumstances. And even if a NEPA violation were found *at the end* of the litigation, established equitable principles afford the flexibility to avoid relief that poses serious risk to national security. The Ninth Circuit's rejection of that course rests on numerous legal errors and conflicts with the decisions of this Court and other courts of appeals. Review by this Court therefore is warranted.

CEQ's interpretation of 40 C.F.R. 1506.11's application to "emergency" circumstances is entitled to substantial deference. Yet, rather than accord such deference, the Ninth Circuit deferred to the *district court's* contrary reading under an abuse-of-discretion standard. Not only is the court's holding inconsistent with a common-sense understanding of "emergency" circumstances and established principles of agency deference, it is contradicted by decisions of other courts of appeals concluding that "emergency" encompasses urgent circumstances even if such circumstances may have been anticipated or foreseen. The Ninth Circuit's decision also conflicts with the D.C. Circuit's approach to applying Section 1506.11 and this Court's decisions requiring deference to agency interpretations.

Moreover, the Ninth Circuit fundamentally misapplied established equitable principles in affirming the preliminary injunction. Congress, in the MMPA, has already determined that the public interest in military readiness outweighs the interest in protecting marine mammals where, as here, the Deputy Secretary of Defense, in consultation with the Secretary of Commerce, has exempted specific readiness activities. Courts of equity lack authority to dis-

regard that statutory balance. But, even if a sufficient showing of actual harm to marine mammals could warrant equitable relief notwithstanding Congress's contrary judgment, the Ninth Circuit, in conflict with other courts of appeals, erred in affirming the preliminary injunction on the "mere possibility" of such harm and failed to accord proper deference to the professional judgment of the President and the Nation's top naval officers that the injunction unreasonably risks the Navy's ability to conduct effective and essential military training.

The immediate and substantial adverse effects of the Ninth Circuit's decision on national security are plain. The President—the Commander in Chief—determined that the injunctive order undermines the Navy's ability "to conduct realistic training exercises that are necessary to ensure combat effectiveness," "essential to national security," and in "the paramount interest of the United States." App. 232a. The Chief of Naval Operations had previously determined that the injunction creates an unacceptable risk to the Navy's ability to train for essential overseas operations at a time when the United States is engaged in war in two countries. App. 44a, 81a. Indeed, the Ninth Circuit *sua sponte* issued a stay of those portions of the injunction that the CNO determined would jeopardize essential naval training pending disposition of the case by this Court. App. 93a. This Court's review is therefore warranted.

1. The President's decision to exempt the Navy's exercises from CZMA compliance and the Navy's acceptance of CEQ-approved alternative arrangements for NEPA compliance removed the bases for the preliminary injunction, which was based on the district court's holding that respondents had shown a likelihood of success on their CZMA and NEPA claims. Neither the district court nor the Ninth Circuit disturbed the President's CZMA exemption, which,

in any event, is not subject to judicial review in this suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See *Franklin* v. *Massachusetts*, 505 U. S. 788, 800-801 (1992). But both courts nevertheless kept the preliminary injunction in place, now on NEPA grounds alone. The Ninth Circuit clearly erred in affirming the preliminary injunction based on the district court's disagreement with CEQ's determination that "emergency circumstances" warranted alternative NEPA arrangements under Section 1506.11. CEQ's reasonable construction of its own regulation fully comports with the regulation's text and should have been given controlling weight.

NEPA is a procedural statute that directs federal agencies, "to the fullest extent possible" but "consistent with other essential considerations of national policy," to prepare a "detailed statement" on "the environmental impact" of proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4331(b), 4332(2)(C). NEPA does not specify what constitutes a "detailed statement." Instead, regulations issued by CEQ identify the steps that federal agencies should follow. 40 C.F.R. 1500.3; see 40 C.F.R. 1501.4 and Pt. 1502; *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350, 355-356 (1989) (CEQ regulations are entitled to "substantial deference").

NEPA, like the Constitution that authorizes its enactment, is not a suicide pact. Consistent with the "rule of reason" "inherent in NEPA and its implementing regulations," *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767 (2004), CEQ's regulations have long authorized agencies to use "alternative arrangements" where "emergency circumstances make it necessary to take an action" having significant environmental impact without observing the provisions of the regulations implementing NEPA. 40 C.F.R. 1506.11.

Thus, as respondent NRDC explained to Congress, "NEPA itself allows for emergency action prior to completion of environmental documentation in consultation with the CEQ." *Federal Forest Management: Hearings Before the Subcomm. on Forests and Public Land Management of the Senate Comm. on Energy and Natural Resources*, 104th Cong., 1st Sess. 219, 222 & n.15 (1995) (citing 40 C.F.R. 1506.11); cf. App. 42a; 137 Cong. Rec. 7007-7010 (1991).

The need to conduct vital military exercises in a time frame that does not allow completion of an EIS surely qualifies as such an "emergency." In this case in particular, CEQ determined that "emergency circumstances" exist in light of: the significant risk that the Navy would be unable to effectively prepare strike groups essential to national security under the district court's January 2008 injunction; the proximity of a January 2008 exercise whose failure would "have immediate ramifications for Navy deployments around the world;" and the lack of "sufficient time to complete an EIS" before future strike groups must be properly trained for worldwide deployment. App. 238a-240a. CEQ's interpretation of the term "emergency circumstances" comports with the regulatory text and common sense and must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation" itself. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation omitted); accord *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Because CEQ's interpretation comports with the regulatory text, the Ninth Circuit plainly erred in affirming the injunction.

The injunction rests on the district court's ruling that no emergency resulted from the court's January 2008 order because the injunction was the foreseeable result of the Navy's failure to complete an EIS, and that only "sudden unanticipated event[s]" can give rise to an "emergency"

under CEQ's regulation. App. 43a-50a. That ruling, sustained by the Ninth Circuit, is untenable. While one definition of "emergency" encompasses "unforseen" or "unexpected" circumstances requiring immediate action, it can more broadly mean a "condition of urgent need for action or assistance." See *American Heritage Dictionary of the English Language* 602 (3d ed. 1992) (def. 2).[2] Indeed, as other courts of appeals have recognized, "some genuine emergencies can be anticipated well in advance." *Pleasantview Nursing Home, Inc.* v. *NLRB*, 351 F.3d 747, 756 n.4 (6th Cir. 2003). A strike by air traffic controllers, for instance, may give rise to an "operational emergency" even if the strike was "reasonably foreseeable" and might have been prevented. See *Letenyei* v. *Department of Transp.*, 735 F.2d 528, 531-532 (Fed. Cir. 1984) (en banc); see also 29 U.S.C. 176, 178 ("national emergency" exists where strike would "imperil the national health or safety"); *United Steelworkers* v. *United States*, 372 F.2d 922, 924 (D.C. Cir. 1966) (per curiam) ("any strike which affects [the military aircraft engine] industry" to "the jeopardy of our national safety" falls within "emergency provisions of Taft-Hartley [Act]").

Whether or not the Navy should have foreseen that a court would find a likelihood that an EIS was required, one

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[2] Accord *Random House Dictionary of the English Language* 636 (2d ed. 1987) ("a situation demanding immediate action," which is "usually unexpected;" "exigency"); *Webster's New Collegiate Dictionary* 368 (1981) (def. 2: "a pressing need"); *Black's Law Dictionary* 469 (5th ed. 1979) (listing multiple definitions, including "exigency" and "pressing necessity"); see also, *e.g.*, *Oxford American Dictionary and Language Guide* 313 (1999) ("a sudden state of danger, conflict, etc., requiring immediate action"); *Webster's Third New International Dictionary of the English Language* 741 (1967) (def. 1c: "a usu. distressing event or condition that can often be anticipated or prepared for but seldom exactly foreseen").

was not prepared, and the court order demanding an EIS before vital military exercises can proceed constitutes an emergency. As the Fourth Circuit recognized, "[i]t would be unreasonable to restrict the definition of 'emergency' to those situations in which the underlying facts are sudden and unforeseen" because, even where a government agency is fully aware of the factors leading to a predictable crisis, the circumstances that ultimately result can "constitut[e] an 'emergency'" if they "requir[e] immediate and drastic action." *United States* v. *Southern Ry.*, 380 F.2d 49, 51 n.4, 55 n.17 (4th Cir. 1967). An "emergency situation" exists when an immediate response is needed to avert a significant impending harm to the public interest, and, for that reason, "[a]n assessment of blame regarding [the cause of] the predicament * * * is quite frankly irrelevant to a determination of whether [the government] is faced with an 'emergency situation.'" *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 866 (2d Cir. 1988) ("emergency situation" may arise where conditions were caused by city's "own intransigence"), cert. denied, 489 U.S. 1077 (1989).

The Ninth Circuit notably did not itself embrace the district court's restrictive reading of "emergency," and it even acknowledged that an "emergency" can be "a situation demanding immediate attention." App. 45a n.41. Notwithstanding that acknowledgment—which should have been dispositive under *Auer*—the panel purported not to "adjudicate the meaning of the word 'emergency' here." *Ibid*. It instead affirmed the district court's interpretation of the "term's plain meaning" on the ground that the district court's analysis (though perhaps ultimately incorrect) did not rely on erroneous "legal principles" or reflect an abuse of discretion. *Ibid*. That approach to deference is precisely backwards. The interpretation of "emergency" by CEQ, not the district court, is entitled to deference under *Auer*.

And, while preliminary injunctions are generally reviewed for abuse of discretion, a lower court's legal rulings, like the one at issue here, are reviewed de novo. *Gonzales* v. *O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 428 (2006). Accordingly, as other courts of appeals have held, a "decision to grant a preliminary injunction that is premised on an error of law *is entitled to no deference* and must be reversed." *Brotherhood of Maint. of Way Employes Div.* v. *Union Pac. R.R.*, 460 F.3d 1277, 1282 (10th Cir. 2006) (emphasis added); accord *Burlington N. & Santa Fe Ry.* v. *Brotherhood of Locomotive Eng'rs*, 367 F.3d 675, 678 (7th Cir. 2004); *Delta Air Lines, Inc.* v. *ALPA*, 238 F.3d 1300, 1308 (11th Cir.), cert. denied, 532 U.S. 1019 (2001); *Bell* v. *Sellevold*, 713 F.2d 1396, 1399 (8th Cir. 1983), cert denied, 464 U.S. 1070 (1984).

Indeed, the Ninth Circuit's interpretive approach to Section 1506.11 conflicts with that of the D.C. Circuit. The district court in *National Audubon Society* v. *Hester*, 801 F.2d 405 (D.C. Cir. 1986), preliminarily enjoined the capture of the last remaining wild California condors after concluding that no "emergency" warranted alternative arrangements under Section 1506.11 because the precipitous decline in condor populations that required urgent action had been recognized "more than eight months before the declaration of the emergency." *National Audubon Soc'y* v. *Hester*, 627 F. Supp. 1419, 1423 (D.D.C. 1986). The D.C. Circuit reversed, holding that the lower court "erred in deciding *itself* that no emergency existed" because CEQ's certification of an emergency based on "the urgent nature of the Wildlife Service's concerns with condor mortality" was "entitled to substantial deference." 801 F.2d at 408 n.3 (internal citation omitted). *A fortiori* such deference is required here, where national security and defense are at issue.

The seriousness of the Ninth Circuit's error is underscored by its view that it was permissible for the district court to disregard CEQ's "emergency" determination because "the Navy ha[d] been on notice of its possible legal obligations" to prepare an EIS and purportedly delayed until January 10, 2008 to seek emergency relief. App. 45a-46a. As just explained, the existence of "emergency circumstances" turns on the urgent need for prompt action. NEPA is to be implemented "consistent with other essential considerations of national policy," 42 U.S.C. 4331(b), and those "essential considerations" are not to be sacrificed based on a court's own notion of "notice."

Moreover, the Ninth Circuit's assessment of the Navy's actions was flawed even on its own terms. The Navy completed a robust EA and concluded in good faith that no EIS would be necessary for the exercises scheduled to occur prior to the completion of the comprehensive SOCAL EIS in January 2009. While the district court found that the Navy's conclusion was probably wrong, no emergency arose until the court so ruled and entered an injunction jeopardizing the Navy's ability to train strike groups effectively for deployment. The initial August 7, 2007 injunction was promptly stayed on appeal sufficiently before the Navy's next exercise was to commence, App. 175a, and when the Ninth Circuit subsequently remanded for entry of a narrower injunction, it noted that the Navy had previously used mitigation measures compatible with its training needs and directed the district court to issue an injunction "under which the Navy may conduct its training exercises." App. 173a-174a. It was not apparent until the district court issued its January 3, 2008 injunction that the court's restrictions—which go well beyond the mitigation measures employed by the Navy—significantly risked training essential to national security.

The President then immediately determined, in issuing an exemption from the CZMA, that the injunctive order "would undermine the Navy's ability to conduct realistic training exercises that are [both] necessary to ensure * * * combat effectiveness" and "essential to national security," App. 232a, and the CNO determined that the court's restrictions posed an "unacceptable risk" to the Navy's ability to train for overseas deployment necessary for national security. App. 81a, 343a-345a. The substantial and imminent harm to the public interest without the alternative NEPA arrangements in this case represent a quintessential example of "emergency circumstances."

Review by this Court of the Ninth Circuit's contrary ruling is warranted because of its serious impact on military readiness, the conflicting interpretation of "emergency" by other courts of appeals in a variety of settings, and the conflict with the D.C. Circuit's *Hester* decision in the specific context of the very CEQ regulation at issue here.

2. Even if the President's and CEQ's emergency actions responding to the injunction's restrictions had not eliminated the basis for respondent's NEPA claim, no preliminary injunctive relief would have been appropriate.

a. A court's equitable discretion to provide preliminary injunctive relief normally turns on a balancing of the relative hardships of the parties and the public interest once the movant has shown a likelihood of success on the merits. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982); see *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). However, when Congress has itself "decided the order of priorities in a given area," a court of equity must follow the "balance that Congress has struck" and lacks discretion to weigh independently its own conception of what factors are relevant to the public interest or the conveniences of the parties. *United States* v. *Oakland Can-*

nabis Buyers' Coop., 532 U.S. 483, 497 (2001) (quoting *TVA* v. *Hill*, 437 U.S. 153, 194 (1978)). The district court's conclusion that a preliminary injunction was necessary to prevent potential harms to marine mammals improperly "ignore[d] the judgment of Congress, deliberately expressed in" the MMPA, that the public interest lies in *permitting* military activity like that at issue here notwithstanding any potential to harm marine mammals. See *Virginia Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 551-552 (1937). That congressional "declaration of public interest and policy" is dispositive. *Ibid.*

The MMPA's prohibition on harassing, injuring, or killing marine mammals at sea reflects Congress's judgment that the public interest normally lies in protecting such mammals to preserve their esthetic, recreational, and economic value for the public. 16 U.S.C. 1361(6), 1362(13) and (18), 1371(a), 1372(a)(1) (2000 & Supp. V 2005). However, Congress has understandably determined that national security can trump marine mammal protection and has authorized the Secretary of Defense to exempt from the MMPA military activity "necessary for national defense," after consultation with the Secretary of Commerce and subject to congressional notification. 16 U.S.C. 1371(f). That authorization "properly balances the equities associated with military readiness and maritime species protection" by subordinating potential harm to marine mammals to the Nation's need for military readiness while assuring involvement by the agency charged with protecting marine mammals and oversight by the politically accountable Branches. See H.R. Conf. Rep. No. 354, 108th Cong., 1st Sess. 669 (2003) (*Conf. Rep.*). "Courts of equity cannot, in their discretion, reject th[at] balance." *Oakland Cannabis*, 532 U.S. at 497; see *Hill*, 437 U.S. at 194 ("[I]t is * * * the exclusive province of the Congress" to "formulate legisla-

tive policies and * * * establish their relative priority for the Nation."). Because the Deputy Secretary of Defense properly exempted the Navy's sonar activities from the MMPA, App. 219a-220a, subject to mitigation measures developed in consultation with NMFS, the courts below exceeded their authority by prohibiting the Navy's sonar use to prevent a potential harm to marine mammals (and respondents' enjoyment of such mammals) that the exemption expressly *authorized*.

Indeed, Congress enacted Section 1371(f)'s exemption authority in part in reaction to respondent NRDC's prior success in obtaining a preliminary injunction against the Navy's use of low-frequency active sonar. See *Conf. Rep.* 669. The court in *NRDC* v. *Evans*, 232 F. Supp. 2d 1003 (N.D. Cal. 2002), had "consider[ed] the public interests both in national security and in protecting marine mammals" and—like the courts below—issued what it regarded as "a carefully tailored preliminary injunction" to "permit[] the use of LFA sonar for testing and training" while imposing substantive restrictions "to reduce the risk to marine mammals and endangered species." *Id.* at 1013, 1051-1055. Congress's creation of a national defense exemption to the MMPA conclusively rejects such judicial balancing where, as here, the exemption authorizes activity even though it may be potentially harmful to marine mammals.

NEPA is, of course, only a procedural statute, *Methow Valley*, 490 U.S. at 350, 353 & n.16, and the substantive harms that justified a preliminary injunction in the district court's view are precisely those that Congress has determined must give way to considered concerns about national security. Moreover, an agency's compliance with NEPA is reviewed under the APA, which contemplates that, even where relief is warranted, either declaratory *or* injunctive relief may be appropriate, 5 U.S.C. 703, and expressly pre-

serves the "power or duty of the court * * * to deny relief on any * * * appropriate legal or equitable ground," 5 U.S.C. 702. Cf. *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting) (separation of powers problems associated with judicial interference with military training exercises abroad "make this virtually a textbook case for refusing * * * discretionary relief"), vacated on other grounds, 471 U.S. 1113 (1985); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.). Because Congress and the Secretary struck the controlling balance between military readiness and protection of marine mammals—and because the injunction in any event greatly interferes with training exercises determined by the President and his Chief of Naval Operations to be essential to national security—those provisions of the APA underscore the impropriety of the injunction affirmed by the Ninth Circuit.

We may assume *arguendo* that declaratory relief could be appropriate in this case under the APA, and that even limited equitable relief might be justified to advance other interests—*e.g.*, directing completion of an EIS to advance NEPA's procedural goals while sonar exercises go forward under CEQ's alternative arrangements. Cf. *Romero-Barcelo*, 456 U.S. at 308, 315, 318 (affirming injunction requiring Navy to obtain permit to "achieve [future] compliance with the [Clean Water] Act" while permitting bombing exercises to proceed without required permit). But no injunctive relief could properly bar the use of MFA sonar in the meantime—or be predicated on potential harm to marine mammals—in light of Congress's determination that the public interest requires subordinating the prevention of such environmental harm to national security needs. Cf. *Weinberger* v. *Catholic Action*, 454 U.S. 139, 145 (1981) ("[T]he public's interest in ensuring that federal agencies

comply with NEPA must give way to the Government's need to preserve military secrets.").

b. The Ninth Circuit additionally erred in holding that a showing of a "mere possibility" of irreparable harm justified preliminary injunctive relief. App. 74a-77a, 172a. Because a "preliminary injunction is an extraordinary and drastic remedy," *Mazurek* v. *Armstrong*, 520 U.S. 968, 972 (1997) (per curiam), whose "purpose * * * is merely to preserve the relative positions of the parties until a trial on the merits can be held," *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981), the party seeking such an injunction must make a "clear showing" that temporary equitable relief is necessary. *Mazurek*, *supra*; see *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("stringent" showing required).

The movant therefore carries a heavy burden not only of demonstrating that "he is likely to prevail on the merits" but also that "he *will* suffer irreparable injury" without injunctive relief. *Doran*, 422 U.S. at 931 (emphasis added); see *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) ("likelihood of irreparable injury" required). That is especially so where, as here, the preliminary injunction would dramatically alter the status quo by requiring major changes in critical military training in the middle of a series of predeployment exercises. See *O Centro Espirita Beneficiente Uniao Do Vegetal* v. *Ashcroft*, 389 F.3d 973, 975-976 (10th Cir. 2004) (en banc) (preliminary injunction that would "alter the status quo" requires a "strong showing" both of likely success and an equitable balance), aff'd on other grounds, 546 U.S. 418 (2006).

The lower threshold of a mere "possibility" of irreparable harm (App. 76a-77a) not only is inconsistent with this Court's decisions, but also conflicts with the standard applied by other courts of appeals. See, *e.g.*, *Siegel* v. *LePore*,

234 F.3d 1163, 1176 & n.9 (11th Cir. 2000) (en banc) ("[T]he absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.") (following *Doran*); *Direx Israel, Ltd.* v. *Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) ("'clear showing' of irreparable injury" required); *Borey* v. *National Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991) ("mere possibility of irreparable harm is insufficient"); *Cordis Corp.* v. *Medtronic, Inc.*, 780 F.2d 991, 996 (Fed. Cir. 1985) (similar), cert. denied, 476 U.S. 1115 (1986).

The Ninth Circuit's application of a possibility-of-irreparable-harm standard led directly to the extraordinary preliminary injunction issued in this case. Article III remedies must redress an "injury to the plaintiff" rather than an "injury to the environment," *Friends of the Earth* v. *Laidlaw*, 528 U.S. 167, 180-181 (2000), and the court of appeals recognized that respondents must establish "irreparable harm to [their] membership" in order to obtain injunctive relief. App. 75a. Respondents assert that their members' enjoyment from observing marine mammals would be impaired if such wildlife were harmed. See App. 20a; Pls.' Standing Decls. in Supp. of Mot. for Prelim. Inj. (filed June 22, 2007). Respondents have no legally cognizable interest in individual members of a species. Accordingly, the "loss of only one [animal] is [not a] sufficient injury to warrant a preliminary injunction;" a plaintiff "must demonstrate 'a substantial likelihood of * * * irreparable harm'" to his own interests resulting from some form of "irretrievabl[e] damage [to] the species." *Fund for Animals* v. *Frizzell*, 530 F.2d 982, 986-987 (D.C. Cir. 1975); accord *Water Keeper Alliance* v. *Department of Defense*, 271 F.3d 21, 34 (1st Cir. 2001) (death of "single member of an endangered species" does not qualify as irreparable harm absent showing of how "probable deaths * * * may

impact the species"). Any finding of a irreparable injury therefore must rest upon the existence of permanent *species-level* harm that would materially affect the enjoyment of wildlife by respondents' members. The court of appeals concluded that respondents demonstrated such harm simply by establishing "the possibility of irreparable injury at the species or stock-level." App. 77a.[3]

Moreover, the Navy's 40-year history of conducting sonar exercises in SOCAL with MFA sonar using the same frequency and intensity as that used today, and the absence

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[3] The district court believed that respondents had established a "near certainty" of "irreparable harm to the environment and [their] standing declarants." App. 164a. That was not the premise of the Ninth Circuit's decision, which rested on the "possibility" of irreparable injury. The district court noted that respondents demonstrated that "MFA sonar *can* injure and kill marine mammals, and cause population-affecting levels of disruption," and pointed in large part to the Navy's EA. App. 163a, 216a-217a (emphasis added). But, as explained above, the EA's model predicted only *eight* injuries annually to one species (common dolphins) if the Navy failed to use its own mitigation measures. The court's reference to population-affecting levels of "disruption" thus necessarily referred to predicted temporary, non-injurious "Level B" harassments (see E.R. 400-401), the vast majority of which would be avoided using the Navy's NDE II mitigation measures and, in any event, were predicted to be temporary, short-term, and "highly unlikely" to cause "behavioral patterns [to be] abandoned or significantly altered." See pp. 6-7, *supra*.

These findings are confirmed by NMFS's independent conclusion in January 2008 that, while the SOCAL exercises involve "some potential for injury" that could be minimized with the Navy's protective measures, the exercises were only "likely to elicit temporary behavioral responses from marine mammals" (such as "alerting responses," "temporary movement away from sound sources," or "temporary cessation of feeding or breeding activities") and were not expected to cause any "adverse population level effects for *any* * * * marine mammal populations." App. 258a (emphasis added).

of any documented incidents of sonar-related harm to marine mammals in SOCAL (see pp. 7-8, *supra*), should have sufficed to foreclose the kind of injunctive relief entered below. Indeed, the court of appeals acknowledged that "the record contains no evidence that marine mammals have been harmed from the use of MFA sonar in [SOCAL]," but sought to justify its affirmance by observing that such harms might be hard to detect. App. 76a; see App. 22a-23a. Even assuming that to be correct, the absence of evidence cuts still further against any injunction, because respondents bore the burden of showing that they "will suffer irreparable injury" without the preliminary injunction. *Doran*, 422 U.S. at 931.

c. The Ninth Circuit's distortion of equitable principles extended still further to the court's approach to balancing the hardships of the parties and the public interest. In this case, the balance could not be more clear. The United States is "currently engaged in war, in two countries," App. 182a, and many of the same men and women who must train in SOCAL must conduct daily aircraft missions or deploy into Iraq and Afghanistan from Navy strike groups. In the judgment of those responsible for their training and safety, including the President and the CNO, the preliminary injunction presents an unacceptable risk to training effectiveness and the national security of the United States. App. 231a-232a, 342a-347a. Congress has similarly determined that the public interest in protecting marine mammals must be subordinated to the interest in military preparedness activity where, as here, the Department of Defense has determined an MMPA exemption is "necessary for national defense." 16 U.S.C. 1371(f); see pp. 23-24, *supra*. That statutory provision alone defeats any basis for an injunction. But in any event, "no governmental interest is more compelling than the security of the Nation," *Haig* v.

Agee, 453 U.S. 280, 307 (1981) (quoting *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964)), and, in this case, the mere "possibility" of irreparable harm to the enjoyment of marine mammals cannot remotely outweigh that interest.

The Ninth Circuit itself recognized the "possibility" that the Navy would be unable to effectively train and successfully certify a strike group under the preliminary injunction. App. 88a-89a. But it decided that that "possibility" must become a reality before the Navy "may return to the district court to request relief on an emergency basis," since the Navy's prediction of harm to national security based on the professional military judgments of the Nation's top naval officers will be "necessarily speculative" until the Navy actually operates under the injunction's restrictions. App. 80a, 88a-89a.

Absent from that analysis is any attempt to weigh the *magnitude* of potential harm to one party against the harm to the other. The harm to the Navy and the public interest from the injunction is palpable. The Navy centers its global management of strategic naval forces around a strike group's timely preparation for deployment, and the inability to certify a single strike group during a scheduled COMPTUEX and JTFEX, particularly at a time of war, would severely undermine the United States' ability to conduct warfare operations and have enormous adverse implications for national security. App. 314a-325a; see App. 343a-344a; 73 Fed. Reg. at 4191; E.R. 1156. Such risk of harm to the national security must be given great weight in any equitable balancing. The potential impact on the safety of Sailors and Marines deployed abroad or on their ability to carry out vital operations in a climate with no margin for error cannot be dismissed as mere "speculation." The consequences of the potential becoming a reality are simply too great.

Furthermore, assessing the acceptable degree of risk to the effectiveness of military training is precisely the type of professional military judgment the judiciary should avoid. *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence," *ibid*., particularly where the evaluation of threats to national security must rest on "[p]redictive judgment[s] * * * made by those with the necessary expertise." *Department of Navy* v. *Egan*, 484 U.S. 518, 529 (1988). The Ninth Circuit neglected to heed those familiar admonitions, second-guessing the judgments of the President, CNO, and other naval officers to which it owed great deference. See *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986); *Rostker* v. *Goldberg*, 453 U.S. 57, 66 (1981).

The CNO has explained that, in his professional judgment, two provisions of the preliminary injunction in particular create unacceptable risk of harm to national security. First, the injunction requires that sonar operations terminate whenever a marine mammal is detected within 2200-yards (1.25 miles). That distance is eleven times greater than the existing shutdown distance developed in consultation with NMFS and employed by the Navy, and will increase the surface area within which a marine mammal's presence will force a sonar shutdown by a factor of over 100. App. 226a, 332a, 344a-345a. Both the Ninth Circuit and the district court rejected the CNO's risk assessment because the Navy has occasionally shutdown voluntarily at similar distances when the tactical circumstances allowed. App. 83a-84a. But it is one thing to voluntarily accommodate environmental concerns when it will not endanger the exercise and quite another to be under a *mandatory* judicial order to discontinue sonar operations, especially at a critical juncture. The courts should have credited the

Navy's willingness to avoid harm when possible rather than displacing the judgments of the CNO and other high-ranking naval officers that the 2200-yard mandatory shutdown requirement would unacceptably risk training and national security. App. 332a, 344a-346a, 353a-357a; see App. 269a-271a, 279a-285a.

Similarly, the Ninth Circuit concluded that requiring a six decibel (75%) reduction in sonar power in significant surface ducting conditions would not likely prevent effective training because "such conditions occur relatively rarely" in SOCAL. App. 86a. But the threat to effective training does not result simply from preventing surface-ducting sonar training. Rather, the unacceptable risk primarily stems from the fact that surface ducting cannot be effectively predicted in advance, and requiring the unexpected power-down of all ships in a strike group when significant surface ducting conditions arise—without regard to the tactical significance of the timing, the length of time such conditions may persist, or the presence of any marine mammal—would "prevent[] realistic training." App. 299a-300a, 333a, 342a-345a; pp. 5-6, *supra*.

3. The Ninth Circuit thus fundamentally erred in failing to respect the Executive's judgment that "emergency circumstances" exist under NEPA and at every step of the analysis of the propriety of injunctive relief. It did so, moreover, in a manner that conflicts with the judgment of Congress, the President, and the Nation's top naval officers as well as decisions of this Court and other courts of appeals. For these reasons, and because of the ensuing harm to the national security, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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