No. 07-1239

IN THE
Supreme Court of the United States

DONALD C. WINTER, *et al.*,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CALIFORNIA FORESTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
Continued

Page

TABLE OF AUTHORITIES
Continued

Page

Statutes

Other Authorities

INTERESTS OF *AMICUS CURIAE*[1]

Amicus California Forestry Association represents forest products companies in the geographical area encompassed by the Ninth Circuit. The second question presented in the Petition[2] – regarding the preliminary injunction standards articulated by the Ninth Circuit – is of vital concern to the California Forestry Association's members.

Timber sales on federal lands are frequent subjects of litigation within the Ninth Circuit. Environmental group plaintiffs often seek to preliminarily enjoin the timber harvesting. Ninth Circuit courts frequently grant such preliminary injunctions, relying on the easily-met standards articulated in a timber case (*Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147 (9th Cir. 2006)), and then applied by the Ninth Circuit here. *See* App. 37a, 76a (citing *Earth Island*).

Those preliminary injunctions interrupt the steady supply of timber needed for our members' businesses. They cause economic injuries to

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[1] Petitioners and Respondents have consented to the filing of this brief in letters on file in the clerk's office. All parties were notified of *Amicus*'s intent to file this brief more than 10 days before the due date. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] "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." Pet. at I.

businesses and local communities. Additionally, where federal forests are not timely thinned, this increases the risks of insect infestations coming onto private timberlands and the risks of catastrophic wildfires to timberlands and local communities.

The California Forestry Association supports the Petition and the position of the United States that Ninth Circuit case law sets the bar too low for what should be an extraordinary preliminary injunction. This brief supplements the Petition, and can assist the Court in deciding whether to grant the writ, in two ways.

First, the brief explains why this case has broad significance beyond the clearly important area of military preparedness. The preliminary injunction standards employed in the Ninth Circuit have pernicious effects on a wide array of agency actions and private economic activity, as illustrated with respect to recurring issues involving federal timber sales. Second, the brief provides additional documentation that the decision below is contrary to decisions of this Court and perpetuates conflicts in the circuit courts.

SUMMARY OF ARGUMENT

The national security and separation of powers implications of the Ninth Circuit's preliminary injunction against naval training exercises make *Winter v. Natural Resources Defense Council* a strong candidate for this Court's review. This case becomes an even more compelling candidate after consideration of two additional factors.

First, the decisions below contravene Supreme Court precedents and perpetuate mature conflicts in the circuits. Second, the Ninth Circuit's easily-met

standards for a preliminary injunction have broad significance. Those standards promote preliminarily enjoining a wide variety of important federal programs and productive private activities based on speculative risks of irreparable injury, and through distorted analyses where short-term preservation dominates. This case warrants review under Rule 10's considerations.

REASONS FOR GRANTING THE PETITION

1. In its *NRDC v. Winter* opinions, the Ninth Circuit declined to abide by national defense and emergency determinations made by the Executive and Legislative Branches. The Ninth Circuit restricted the use of sonar in naval training exercises in ways that the responsible Executive Branch officials believe are compromising our Nation's military preparedness. The Ninth Circuit did so through analyses that sonar's risk of injury to individual marine mammals should be controlling under a "mere possibility" of irreparable injury test,[3] the balance of harms among the parties test, and the public interest test. *See* App. 75a-77a, 87a-89a.

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[3] This low standard was crucial to the conclusion that NRDC had satisfied the irreparable injury prerequisite to a preliminary injunction. As the Ninth Circuit stated, "the record contains no evidence that marine mammals have been harmed by the use of MF sonar in the Southern California Operating Area" – scientists simply believe "sonar may cause injury" to some marine mammals in certain circumstances. App. 76a.

And the "injuries" often could be minor. Most of the hypothesized injuries from sonar to marine mammals consist of "Level B" temporary hearing problems and other non-permanent injuries. App. 17a, 19a-20a, 64a-65a, 75a-76a.

The Ninth Circuit erred in not honoring the balancing of public interests by the Legislative and Executive Branches. *See* Pet. at 22-25. While the Marine Mammal Protection Act ordinarily favors the interests of marine mammals, it allows the Secretary of Defense to exempt activities "necessary for national defense." 16 U.S.C. 1371(f). The exemption was invoked here. Because Congress and the Executive Branch have found that national defense interests trump the interests in avoiding small potential impacts to some marine mammals, the Ninth Circuit's contrary view falls under *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001), and other Supreme Court authority. *See* Pet. at 22-25.

The courts below also overrode a determination by the agency implementing the National Environmental Policy Act ("NEPA"), the Council on Environmental Quality ("CEQ"). The Navy had prepared an extensive environmental assessment on the training program, and is preparing the environmental impact statement ("EIS") demanded by the lower courts. CEQ determined that the training exercises could continue in the interim. CEQ approved alternative NEPA procedures because an "emergency" exists within the meaning of CEQ's NEPA rules. *See* Pet. at 16-22.

The Ninth Circuit, by refusing to defer to CEQ's permissible reading of its own rules, contravened *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The reading of a NEPA "emergency" approved by the Ninth Circuit (App. at 50a-56a) also conflicts with

National Audubon Soc'y v. Hester, 801 F.2d 405, 408 (D.C. Cir. 1986).[4]

Accordingly, the decision below warrants review because it is inconsistent with Supreme Court precedents and sets up a circuit conflict. Perhaps more importantly, the Ninth Circuit's view that it can freely override judgments and interpretations by the political Branches has troubling separation-of-powers implications that augur in favor of accepting review.

2. The courts below found likely violations of NEPA. The likely violations were: (1) an EIS should be prepared on the naval training exercises to comply with NEPA, rather than the extensive environmental assessment prepared by the Navy Department; and (2) CEQ's determination was improper that an "emergency" exists allowing the training exercises to continue until the EIS is prepared. App. 37a-74a.

Thus, the Ninth Circuit granted an intrusive preliminary injunction limiting the Navy's training exercises, based on a likely procedural violation that was being cured through the Navy's preparation of an EIS. *See* Pet. at 17, 21, 25. Such a substantive injunction for a procedural violation that is being cured contravenes several of this Court's precedents.

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[4] The proper test for a NEPA "emergency" has significance for many federal programs. *See* App. at 48a-49a. This includes forestry matters such as salvage logging after a natural disaster, and forest thinning to reduce risks of catastrophic wildfires. *See* the "forest management" hearings cited in the Pet. at 17.

Most notably, in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), this Court reversed a substantive injunction against the Navy's bombing exercises. The Court found the Navy's commitment to obtain a permit under the Clean Water Act was a sufficient (procedural) remedy to achieve statutory compliance. 456 U.S. at 312-18. The fact pattern in *Romero-Barcelo*, of course, is similar to the naval training program and NEPA violations asserted here.

More generally, this Court has preferred less-drastic relief that does not prevent the agency from operating. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63-64 (1993); *Brock v. Pierce County*, 476 U.S. 253, 260 (1986).

In *NRDC v. Winter* and in *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147 (9th Cir. 2006), the Ninth Circuit has applied NEPA in a preservationist manner – as presumptively supporting a substantive injunction for a curable procedural NEPA defect. *See* App. 56a-79a; *Earth Island*, 442 F.3d at 1177 ("the preservation of our environment, as required by NEPA . . . , is clearly in the public interest"). That approach is inconsistent with this Court's guidance that NEPA is procedural, and does not mandate adoption of the most preservation-oriented alternative. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-53 (1989) (reversing a Ninth Circuit decision).

The Ninth Circuit's imposition of one reading of NEPA over CEQ's reading repeats another error found in *Robertson v. Methow Valley*. At 490 U.S. 354-56, the Court reversed the Ninth Circuit's reading that NEPA itself requires a "worst case"

analysis, and reversed the lower court's refusal to defer to a new CEQ rule.

Moreover, as *NRDC v. Winter* and *Earth Island* illustrate, the Ninth Circuit often applies preliminary injunction standards in a manner that effectively presumes environmental injuries are irreparable.[5] Yet, this Court reversed the Ninth Circuit's earlier presumption that environmental injury is irreparable in *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 544-46 (1987).

In sum, the Ninth Circuit's NEPA-related rulings are seriously out of step with this Court's guidance. This case is an appropriate vehicle for this Court's exercise of its supervisory jurisdiction over lower courts.

3. Review should be granted because the decision below adopts standards for preliminary injunctions that are inconsistent with established equitable principles and with this Court's precedents. *See* Pet. at I (second question presented), 22-32. *Amicus* would emphasize that the Ninth Circuit's approach has pernicious effects that extend far beyond military preparedness.

As described below, the Ninth Circuit has adopted equitable tests for a preliminary injunction that are easily satisfied, such as the "mere possibility" of irreparable injury. This has the disruptive effect of promoting injunctions against a

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[5] That is, most of mankind's economic activities alter the environment in some way. If there is a "mere possibility" that this environmental alteration could cause irreparable injury, the irreparable injury test is arguably satisfied in the Ninth Circuit. App. 75a-77a.

wide array of federal agency actions and productive private economic activities before courts can fully consider the merits. The easily-met tests encourage plaintiffs who desire preliminary injunctions to forum shop and select courts within the Ninth Circuit.

Thus, the equitable tests the Ninth Circuit applied in *NRDC v. Winter* have broad significance to a wealth of cases in which preliminary injunctions are sought. This broad significance amplifies why the Court should review the Ninth Circuit's aberrant tests.

a. In the Ninth Circuit, a "mere possibility" (Pet. App. 74a-77a, 172a) of irreparable injury suffices to qualify for a preliminary injunction. The Solicitor General shows that a "mere possibility" standard cannot be reconciled with the extraordinary nature of preliminary injunctive relief, nor with several of this Court's precedents. Pet. at 26-30. *Amicus* supplements that showing with the following.

First, the Ninth Circuit's "mere possibility of irreparable injury" standard conflicts with additional Supreme Court authority beyond the three decisions highlighted in the Petition at 26. The "basis for injunctive relief in the federal courts has always been irreparable injury" – an injunction is an "extraordinary remedy" which does not issue for "trifling" injuries. *Romero-Barcelo*, 456 U.S. at 312. Yet, as applied within the Ninth Circuit, preliminary injunctions become a more "ordinary" occurrence.

The Ninth Circuit's "mere possibility" test is in tension with at least two other decisions by this Court. The Court recently overturned the lower

court practice of granting automatic injunctions for patent violations. *eBay v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). That lower court practice is analogous to the Ninth Circuit's practice of issuing injunctions without proof of a substantial likelihood of irreparable injury. The *eBay* decision illustrates the strong gravitational pull in favor of traditional equitable standards.

In the permanent injunction context, the traditional standard is "plaintiff must demonstrate: (1) that it is has suffered an irreparable injury." *eBay*, 547 U.S. at 391. The "standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod.*, 480 U.S. at 546 n.12. Hence, the opinion below is contrary to the high likelihood of irreparable injury required in *eBay* and *Amoco Prod.*

Second, as the Petition (at 26-27) shows, the Ninth Circuit's "mere possibility" of irreparable injury test is in tension with the more stringent tests employed in the Second, Fourth, Eleventh, and Federal Circuits. *Amicus* would add that there are also apparent conflicts with decisions of the D.C., Third, Fifth, and Tenth Circuits.[6] The Ninth Circuit is the outlier, and that should be corrected.

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[6] *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267-68 (10th Cir. 2005); *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000); *Shanks v. City of Dallas*, 752 F.2d 1092, 1097 (5th Cir. 1985).

Third, determining the appropriate level of certainty of irreparable injury required to qualify for an extraordinary preliminary injunction is a recurring question of great significance to both the public sector and the private sector. Succinctly stated: a "mere possibility" test leads to preliminary injunctions in more cases.

Amicus's forestry sector of the economy provides a helpful illustration. The Ninth Circuit and district court cited the forestry decisions in *Earth Island* as establishing a "mere possibility" standard, and as concluding that district court errs if it applies a "significant threat of irreparable injury" test. App. 37a, 76a-77a, 163a, 217a (citing *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147 (9th Cir. 2006)).[7]

The Petition describes how the *NRDC v. Winter* preliminary injunction's disruption of training exercises seriously compromises the Defense Department's mission. Similarly, such injunctions can seriously compromise important Forest Service objectives. After a forest fire, the economic value of scorched trees deteriorates as logs rot and decay. The Forest Service has statutory authority from Congress to use revenues from the salvage sale of

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[7] There are actually two relevant *Earth Island* cases on preliminary injunctions. They concerned salvage sales of scorched timber after separate forest fires, where the revenues generated would help to pay for forest restoration. In both cases, the Ninth Circuit reversed the district court's denial of a preliminary injunction, finding that environmental groups satisfied the easily-met standard of the "mere possibility" of irreparable injury to a few birds and trees. *Earth Island*, 442 F.3d at 1153-55, 1158-59, 1177-78; *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298-99, 1308-09 (9th Cir. 2003).

timber to fund money-losing, but environmentally desirable, reforestation. In this time-sensitive situation, the grant of a preliminary injunction can mean the salvage harvesting and reforestation will not occur, because they become uneconomic at later points in time. *See Earth Island*, 442 F.3d at 1154-55, 1177; *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 408 F. Supp. 2d 916, 917-18 (N.D. Cal. 2006). Yet, because the Ninth Circuit's approach is heavily skewed towards short-term preservation, the economic and environmental harms in granting a preliminary injunction did not dissuade the Ninth Circuit in the *Earth Island* cases.

b. The Ninth Circuit found the "mere possibility of irreparable injury" test was satisfied due to the potential for sonar to injure individual marine mammals. App. 75a-77a. We provide below some further support for Federal Petitioners' position that any "finding of . . . irreparable injury must rest upon the existence of permanent *species-level* harm." Pet. at 27-28.

If there are minor risks to just a few individuals, but a viable population is retained over time, truly irreparable injury is avoided. By maintaining a viable species at the population level, the species continues to reproduce and thrive over time. Since the sad fact is that all individuals eventually die from some cause, the loss of a few individuals is not irreparable from the standpoint of population biology. Accordingly, the loss of a few individuals from viable, plentiful populations of marine mammals not listed under the Endangered Species

Act ("ESA")[8] should not be an irreparable injury. Rather, that loss is the type of "trifling" injury that does not warrant an extraordinary injunction. *Romero-Barcelo*, 456 U.S. at 311-12.

For such sound reasons, the majority of lower courts reaching the issue in non-ESA contexts have found there is no irreparable injury when an action poses risks to a few individuals, but not to the species.[9] To the extent the Ninth Circuit found that speculative injuries to a few individual marine mammals is an irreparable injury (*see* App. 77a), that is contrary to the majority view.

The Court should grant review and provide guidance to the lower courts on the recurring issue of alleged irreparable injury to wildlife.[10]

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8 The panel did not address any ESA claim that sonar causes the unlawful "take" of a member of an endangered wildlife under ESA § 9 that can be enjoined in an ESA § 11 citizen suit. *See* 16 U.S.C. 1538(a)(1)(B) and 1540(g); *Babbitt v. Sweet Home Chapt. of Commtys. for a Great Oregon*, 515 U.S. 687 (1995).

9 The Petition cites *Water Keeper Alliance v. U.S. Dept. of Defense*, 271 F.3d 21, 33-34 (1st Cir. 2001), and *Fund for Animals v. Frizzell*, 530 F.2d 982, 986-87 (D.C. Cir. 1975). *Amicus* would add *Natural Resources Defense Council v. Kempthorne*, No. 05-cv-1207 OWW TAG, 2007 WL 1989015 at *13 (E.D. Cal. July 3, 2007), and *Alabama v. U.S. Army Corps of Eng'rs*, 441 F. Supp.2d 1123, 1135-36 (N.D. Ala. 2006).

10 Wildlife issues frequently arise in forest management contexts. Some lower courts have recognized that, because each species prefers particular habitats, choosing *any* form of active or passive forest management inevitably increases the population size of some species and decreases the population count for other species. *Sierra Club v. Espy*, 38 F.3d 792, 800-02 (5th Cir. 1994). *Accord Seattle Audubon Soc'y v. Moseley*, 80

(continued...)

c. This brings us to the "Ninth Circuit's distortion of equitable principles" with respect "to balancing the hardships of the parties and the public interest." Pet. at 29. We agree with the Solicitor General's judgment that "[a]bsent from [the Ninth Circuit's] analysis is any attempt to weigh the *magnitude* of potential harm to one party against the harm to another" and to the "public interest." Pet. at 30.

The bottom line is: the Ninth Circuit found sonar's risk of injury to individual marine mammals to be dispositive under the "mere possibility" of irreparable injury test, under the balance of harms among the parties test, *and* under the public interest test. *See* App. 75a-77a, 87a-89a. This repeats a pattern wherein the Ninth Circuit often grants preliminary injunctions by employing analyses heavily skewed towards short-term environmental preservation. *See Earth Island*, 442 F.3d at 1177 ("preservation of our environment . . . is clearly in the public interest"); *Earth Island*, 351 F.3d at 1308 ("the broader public interest in the preservation of the forest and its resources").

There are, however, other substantial public interests. One guidepost is that courts must consider the public interest as reflected in the statutes enacted by Congress. *Amoco Prod.*, 480 U.S. at 547 (the Ninth Circuit erred in not considering the public interest in oil and gas

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(continued)
F.3d 1401, 1404 (9th Cir. 1996). Nonetheless, the Ninth Circuit sometimes finds that the risks forest management poses to some individual wildlife warrants a preliminary injunction. *E.g.*, *Earth Island*, 442 F.3d at 1170-77.

development reflected in the Outer Continental Shelf Lands Act).[11] Here, the Marine Mammal Protection Act reconciles the public interests in military preparedness and in protecting marine mammals by favoring the former. The Ninth Circuit erred in not honoring that priority of public interests. *See* Pet. at 23 and 29; page 4, above.

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[11] In *Amicus*'s forestry area of concern, Congress has directed that national forests be managed for multiple uses under principles of sustained yield.. 16 U.S.C. 528-31, 1604(e). This mandate encourages salvage logging (16 U.S.C. 1604(k) and 1611(b)), and contemplates that the sustained-yield harvesting of live trees will be carried out. 16 U.S.C. 475, 1604(e) and (g)(3)(F)(v), and (m), 1611. There are also legislatively-recognized public interests in thinning timber to reduce wildfire risks to local communities and to promote forest health. *See* 16 U.S.C. 551; the Healthy Forests Restoration Act in 16 U.S.C. 6511-91; *Healthy Forests – An Initiative for Wildfire Prevention and Stronger Communities* 4 (White House 2002) (http://www.whitehouse.gov/infocus/healthyforests/Healthy_Forests_v2.pdf). Thus, contrary to the Ninth Circuit's statement in *Earth Island*, 442 F.3d at 1177, the National Forest Management Act does not mandate "preservation of our environment." *Accord Sierra Club v. Espy*, 38 F.3d at 800.

Amicus mentions all this to illustrate that the preservationist tone in *NRDC v. Winter* recurs in other Ninth Circuit preliminary injunction opinions. The breadth of the problem supports granting review in this case. The Court's later opinion on the pertinent considerations for an extraordinary preliminary injunction will lead to more balanced rulings in courts within the extensive Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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