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.*,
Respondents,

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the district court acted within its discretion in issuing a carefully tailored preliminary injunction, to address the Navy's violations of the National Environmental Policy Act, that permitted the Navy to conduct certain sonar training activities subject only to its implementation of limited and narrowly tailored mitigation measures for the protection of the marine environment that the court determined were feasible, appropriate, and posed a minimal burden on the Navy.

2. Whether the court of appeals erred in determining that the district court was not compelled to vacate a preliminary injunction in response to a determination by the Council on Environmental Quality ("CEQ") that the mitigation measures included in the injunction created an "emergency" that would prevent critical Navy training, where the CEQ determination was based on an *ex parte* factual presentation by the Navy that omitted and ignored the facts on which the district court based its determination that the interim relief would permit the Navy to effectively train and certify its troops, and the CEQ determination was neither authorized by the governing statute nor by CEQ's implementing "emergency" regulation.

RULE 29.6 STATEMENT

Respondents Natural Resources Defense Council, Inc.; International Fund for Animal Welfare; Cetacean Society International; League for Coastal Protection; and Ocean Futures Society have no parent and there are no publicly held companies that hold any stock of these respondents. Respondent Jean-Michel Cousteau is an individual.

I. INTRODUCTION

In 2006, the Navy decided not to prepare an Environmental Impact Statement ("EIS") to evaluate its planned use of high intensity mid-frequency active ("MFA") sonar during 14 major training exercises off the coast of southern California ("SOCAL exercises"). Respondents advised the Navy as early as 2004 that the National Environmental Policy Act ("NEPA") required the Navy to prepare an EIS or reduce to insignificance the environmental effects its sonar training would cause. When the Navy refused to comply, Respondents brought lawsuits to enforce NEPA's requirements for these and similar exercises. In mid-2006 the Navy was enjoined from proceeding with sonar exercises in Hawaii because the Navy had failed to prepare an EIS and the Navy's proposed mitigation failed to prevent significant environmental harm. The Navy settled that litigation with a consent decree that obligated the Navy to employ enhanced mitigation measures and then successfully trained using those measures.

Despite learning in the Hawaii case that an EIS is required and that additional mitigation measures are both necessary and feasible, the Navy chose to press ahead without an EIS for the SOCAL exercises at issue in this case, and also backslid on mitigation, refusing to incorporate even the proven mitigation measures agreed to in Hawaii. The result for the SOCAL exercises was predictable: the Navy was enjoined again for failure to comply with NEPA.

The district court determined – after reviewing a record consisting of thousands of pages of scientific evidence, expert declarations, and the Navy's own internal documents – that Respondents had

demonstrated a "strong likelihood" of prevailing on the merits and a "near certainty" of irreparable harm from the proposed SOCAL exercises.

After the Navy appealed those findings and lost, the district court addressed in detail the selection of mitigation measures that would minimize irreparable harm and allow the sonar training to proceed. The court received additional briefing and evidence, and toured a Navy destroyer to better understand the Navy's training needs and the effects of the proposed mitigation on the Navy's training. Much of the evidence bearing on mitigation was drawn from the Navy's own records of prior exercises in which the Navy successfully trained its sailors in sonar use using mitigation methods that were similar or identical to those the court eventually ordered. The court determined that the Navy's post-litigation assertions that it could not train using the ordered mitigation measures were contradicted by the pre-litigation record. It then issued a narrowly tailored preliminary injunction requiring the Navy to implement six additional mitigation measures, after making specific findings that these measures would not prevent the Navy from training and certifying its troops, and were practicable based on the Navy's own internal documents regarding its past mitigation practices.

The court of appeals affirmed each of the district court's conclusions, as well as the district court's balancing of the harms and public interest, under this Court's well-settled "abuse of discretion" standard for reviewing preliminary injunctions.

Petitioners complain that the district court and the court of appeals did not sufficiently defer to the Navy's views, nor to the views of the White House

and its Council on Environmental Quality ("CEQ") after Petitioners appealed to the Executive Branch to undo the injunction. In doing so, Petitioners make much of contrary factual determinations and watered-down mitigation suggested by CEQ after a post-injunction "consultation" between the Navy and CEQ which failed to consider the evidence underlying the district court's findings that the Navy could train effectively with the required mitigation measures. The district court and court of appeals rejected this argument, correctly seeing CEQ's litigation-driven "consultation" for what it was: a hasty, one-sided, and incomplete proceeding without basis in either NEPA or CEQ's own regulations. The district court acted within its equitable discretion in determining that the CEQ action did not require the court to vacate its injunction.

Petitioners fail to identify any legal issue appropriate for certiorari. The application of the standards for preliminary injunctive relief, agency deference, and equitable discretion to the complex factual record developed in the district court presents neither a novel issue of law nor a conflict with the holdings of this Court or a sister circuit. Accordingly, the petition should be denied.

II. STATEMENT OF THE CASE

1. The ocean areas off southern California are among the richest and most biologically diverse in the world. App. 11a. They contain at least 37 species of marine mammals, including a globally important population of endangered blue whales; and have been identified by biologists as one of the world's "key areas" for beaked whales, which the Navy acknowledges are acutely vulnerable to injury from

sonar. *Id.* The SOCAL exercises flood this unique and fragile southern California marine environment with harmful levels of high-intensity sonar noise. Respondents sought implementation of commonsense protective measures to limit the serious predicted impacts on the SOCAL marine environment.

There is no dispute that the Navy's use of MFA sonar can kill, injure, and disturb many marine species, including marine mammals. App. 11a-16a, 76a. Much of the evidence of the serious harm caused by MFA sonar to marine mammals – including widespread disruption, mass injury, and death – is recited in the lower courts' opinions in this case. App. 11a-16a, 156a-157a, 202a-206a. This harm is especially acute in beaked whales, many of which stranded and died on the shores of the Bahamas in 2000 following a naval sonar training exercise. Those whales and others killed in similar incidents were found to have suffered physical trauma as a result of sonar exposure, including hemorrhaging around the brain, ears, and other tissues. App. 15a-16a 205a-206a.

2. On August 7, 2007, the district court preliminarily enjoined the Navy from using MFA sonar during the remaining SOCAL exercises. The court found that NRDC had shown a "strong likelihood" of success on its claims that the Navy violated NEPA on at least three independent grounds, including its failure to prepare an EIS despite the potential for significant environmental impacts evidenced in the Navy's own EA. App. 200a-211a. The court also found that the Navy had likely violated the Coastal Zone Management Act ("CZMA") by failing to apply for a "consistency determination"

from the California Coastal Commission for its sonar activities, and by refusing to implement mitigation necessary to achieve consistency with the California Coastal Act. App. 211a-215a; 16 U.S.C. §§ 1451 *et seq*. The court further found that the SOCAL exercises, as planned, presented a "near certainty" of irreparable harm absent injunctive relief. App. 75a, 164a, 217a.

In reaching these conclusions, the district court deferred to the Navy's estimates of harm in its EA – which the EA asserts are based on the "best available science" – despite the court's acknowledgement of the considerable evidence that the Navy's methodology underestimated impacts to marine species. App. 20a, 63a, 205a-206a. The EA predicts that sonar use during these exercises will cause 466 permanent injuries of beaked whales, including 436 injuries of Cuvier's beaked whales in a stock estimated by NMFS to be as small as 1,121 individual animals. App. 19a, 204a. The EA also predicts approximately 170,000 instances of disruptive "harassment," a category of harm that is defined in the Marine Mammal Protection Act ("MMPA") to exclude biologically insignificant effects. App. 64a, 204a; 16 U.S.C. § 1362(18)(B)(ii).

The district court noted that its order should have come as no surprise to the Navy, given that in July 2006 – long before the Navy submitted its flawed environmental analysis for the SOCAL exercises – it had been ordered to halt another sonar training exercise, Rim of the Pacific 2006 ("RIMPAC") (a major exercise off the Hawaiian Islands), for failure to prepare an EIS. App. 207a-208a. That injunction was based on substantially the same NEPA violations

found here, including a finding that the Navy's proposed mitigation was inadequate. *Id.*; App. 26a. The Navy's EA for the SOCAL exercises projected roughly *five times* as many "takes" of marine mammals as the previously-enjoined RIMPAC exercise. App. 204a, SER2 186 (C.A. No. 07-56157). Nonetheless, the Navy proposed *even less* mitigation for the SOCAL exercises (i) than the court had found to be inadequate in the proposed RIMPAC exercise and (ii) than the Navy had utilized, without reported adverse affects on training, in the eventual RIMPAC exercise conducted pursuant to a consent decree and in numerous other exercises conducted later that year. App. 33a, 72-73a, 210a.

The district court found here that an EIS was required because the Navy's proposed mitigation measures would not ameliorate the significant environmental effects of its exercises. App. 207a-208a. While the Navy claimed to have implemented "29 protective measures," the court found that virtually all of those measures govern implementation of a single "safety zone" provision, which requires the Navy to temporarily power-down or shut-down its sonar if marine mammals are detected within, respectively, 1000 yards and 200 yards of a sonar source. App. 32a-33a, 102a. The district court concluded that the Navy's safety zone was "grossly inadequate to protect marine mammals from debilitating levels of sonar exposure" (App. 140a), and that the Navy's mitigation scheme as a whole was "woefully inadequate and ineffectual" (App. 215a).

3. On November 3, a merits panel of the court of appeals affirmed the district court's determination

that Respondents were entitled to injunctive relief in light of the Navy's prospective violations of federal law and the likelihood of irreparable harm to the marine environment from the challenged activities. Nevertheless, noting "the Navy's past use of additional mitigation measures" and "the district court's longstanding involvement with this matter and its familiarity with the effectiveness and practicability of available mitigation measures," the court remanded for the lower court to issue a tailored injunction that would "provide satisfactory safeguards for the protection of the environment" while permitting the Navy to train effectively. App. 172a-174a.

On remand, the district court ordered further briefing and evidentiary submissions, reviewed "thousands of pages of documents and briefs" (App. 147a), and toured sonar facilities aboard the *USS Milius* in San Diego in order to assess the feasibility of proposed mitigation measures (App. 6a, 102a).

On January 3, the court issued a tailored preliminary injunction imposing six additional mitigation measures that the Navy had not included in its EA. App. 34a-35a, 138a-144a. In crafting its order, the court expressly acknowledged and affirmed the government's national security concerns (*see* App. 35a, 103a-104a), but concluded that none of the additional measures would prevent the Navy from effectively training and certifying its troops (*see* App. 79a-81a; 135a-136a).

The district court reviewed extensive evidence showing that the Navy has employed these or similar measures – and, in some cases, more restrictive measures – during its major exercises in the past,

without sacrificing training objectives. App. 136a, 185a. The district court rejected many of NRDC's proposed mitigation measures as too sweeping or as creating an undue burden on training. App. 35a, 79a, 103a-105a. With respect to the measures it ordered, however, Petitioners' claims that the challenged measures create an "unacceptable risk" were contradicted by evidence in the record, "much of it submitted by the Navy itself, [which] supports the district court's conclusion that the challenged mitigation measures will not likely compromise the Navy's ability to effectively train and certify its west-coast strike groups." App. 80a-81a.

4. On January 10, 2008, after its unsuccessful litigation in the district court, the Navy initiated an *ex parte* proceeding before the White House CEQ in an attempt to overturn the district court's order. App. 55a. Three business days later, after reviewing an incomplete record containing only the Navy's selected evidence and arguments and omitting virtually all of the evidence and argument that had compelled the district court and court of appeals to rule as they did, CEQ determined that "emergency circumstances" were present and ordered "alternative arrangements" for the SOCAL exercises under the alleged regulatory authority of 40 C.F.R. § 1506.11. App. 240a-241a. CEQ determined, based on the Navy's one-sided evidence and private "discussions between our staffs," "that the Navy cannot ensure the necessary training . . . under the terms of the injunctive orders." App. 240a. CEQ then suggested its own mitigation measures in place of the court's measures and NEPA's statutory requirements. App. 241a-247a. Those measures are virtually identical to those that the district court held "woefully

inadequate and ineffectual." *Compare* App. 215a *with* 107a. Also on January 15, President Bush signed a memorandum purporting to exempt the Navy's activities from the CZMA. App. 231a-232a.

Later on January 15, 2008, within minutes of the CEQ determination, the Navy moved to vacate the injunction based on CEQ's action. On February 4, the district court denied the Navy's motion. The court found that CEQ's unprecedented application of its "emergency" regulation to rescue an agency from a foreseeable court order, resulting from the agency's failure to prepare NEPA documentation for long-planned, routine actions, contravened both NEPA and the CEQ regulation and was therefore *ultra vires*. App. 112a-122a. It also found that both the NEPA waiver and CZMA exemption, as applied, raised serious constitutional concerns, though it declined to reach those issues under the doctrine of constitutional avoidance. App. 122a-135a.

On March 31, the court of appeals issued a 106-page opinion affirming the district court's preliminary injunction.

III. REASONS FOR DENYING THE PETITION

A. Granting Limited Preliminary Relief Was Well Within the District Court's Equitable Discretion

The district court determined, after an exhaustive review of thousands of pages of evidence, that there was a "near certainty" that the SOCAL exercises would cause widespread, irreparable harm to the environment and that the Navy's planned mitigation was "woefully inadequate." The court further found,

after again reviewing thousands of pages of evidence, that the injunction would be a minimal imposition on the Navy's planned training. These factual findings led the district court to exercise its equitable discretion to fashion limited and appropriate interim relief to address the Navy's violations. Petitioners fail to identify any issue fit for this Court's review arising from the district court's exercise of its equitable discretion.

1. Petitioners assert that Congress' enactment of a defense readiness exemption to the MMPA strips the federal courts of equitable discretion to issue tailored injunctions in NEPA cases when Navy actions threaten significant harm to marine mammals. This novel argument ignores the traditional equitable discretion of the federal courts, the plain language of the NEPA statute, and Congress' actual approach to granting exemptions under NEPA.

This Court has long held that it is the province and duty of the federal courts to balance the equities except where Congress has issued a "clear and valid legislative command" displacing the courts' traditional equitable discretion or overriding provisions of federal law. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles.").

When Congress enacted the MMPA exemption, it issued a "clear and valid legislative command"

granting the executive the limited power to exempt agencies from MMPA compliance, but only MMPA compliance. The MMPA exemption provides:

> The Secretary of Defense . . . may exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with *any requirement of this chapter*, if the Secretary determines that it is necessary for national defense.

16 U.S.C. § 1371(f)(1) (emphasis added). This MMPA-specific language can hardly be taken as a "clear and valid legislative command" to alter the courts' equitable discretion when enforcing the requirements of other statutes, including NEPA.

Congress has granted no similar exemption from NEPA requirements. Instead, under the statutory scheme that Congress has established, Congress, not the executive, is the arbiter of when specific planned activities should be exempted from normal NEPA procedures. Congress retains the power to exempt planned military activities from NEPA compliance, and has used that reserved power when necessary. *See*, *e.g.*, Fiscal Year 2001 National Defense Auth. Act, Pub. L. No. 106-398, § 317, 114 Stat. 1654, 1654A-57 (2000) (specifically exempting Defense Department from preparing nationwide EIS for low-level flight training); 42 U.S.C. § 10141(c) (exempting EPA from NEPA review of criteria for handling spent nuclear fuel and high-level radioactive waste); 43 U.S.C. § 1652(d) (exempting construction of Trans-Alaska Pipeline from further NEPA compliance).

Even if one looks beyond the plain language of the statute and Congress' exercise of its reserved power to the legislative histories of NEPA and the MMPA,

there is no evidence to support Petitioners' argument that Congress meant the MMPA exemption to strip the courts of their authority to enforce NEPA requirements. H.R. Conf. Rep. No. 354, 108th Cong. 1st Sess. 669 (2003) (specifying that exemption applies to MMPA). Indeed, the injunction in *NRDC v. Evans*, 232 F. Supp. 2d 1003, 1053-54 (N.D. Cal. 2002), which Petitioners note played a role in Congress' enactment of the MMPA exemption, granted injunctive relief under *both* the MMPA and NEPA. Yet Congress chose neither to enact a NEPA exemption, nor to suggest any limitation on appropriate relief. Courts should be "[u]nwilling to view this omission as an accident." *Oakland Cannabis*, 532 U.S. at 493. The Navy's speculation about Congressional intent is thus unsupported by the statutory language, the statutory scheme, or the legislative history of the statutes in question.

2. The Navy next argues, citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), that because NEPA is a procedural statute the lower court goes too far in ordering relief beyond a simple mandate to prepare an EIS. Petitioners' Brief ("Pet.") at 24-25. To the contrary, *Romero-Barcelo* affirmed the rule, discussed above, that absent a clear congressional directive to the contrary, district courts sitting in equity retain their "traditionally broad discretion in deciding appropriate relief." 456 U.S. at 310, 316.

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the

> full scope of that jurisdiction is to be recognized and applied.

Id. at 313 (*quoting Porter*, 328 U.S. at 398); *see also Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). *Romero-Barcelo* thus *affirms*, rather than limits, a district court's equitable discretion. *See NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 1000 (9th Cir. 2000).

Moreover, although Congress chose procedural mechanisms rather than substantive restrictions to achieve NEPA's goals, Congress made clear that those procedures – *e.g.*, requiring agencies to undertake thorough environmental analyses before taking actions significantly affecting the environment – were enacted to further substantive environmental objectives and to "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321; *see also* 40 C.F.R. § 1500.1(a) (NEPA is "our basic national charter for protection of the environment"). Indeed, for over three decades the federal courts have balanced the equities in NEPA cases, including cases raising significant military readiness concerns, and have fashioned interim relief where appropriate and where doing so would further the goals of the statute. *See*, *e.g.*, *I-291 Why? Ass'n v. Burns*, 517 F.2d 1077 (2d Cir. 1975); *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972); *Citizen Advocates For Responsible Expansion, Inc. (I-Care) v. Dole*, 770 F.2d 423 (5th Cir. 1985); *'Ilio'Ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1086 (9th Cir. 2006); *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002); *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Foundation of*

Econ. Trends v. Weinberger, 610 F. Supp. 829, 843-44 (D.D.C. 1985).

In short, to hold that the district court lacked equitable discretion here would be contrary to the statutory scheme that Congress enacted, would thwart Congress' stated goals, and would displace over three decades of practice in the federal courts of balancing the equities in NEPA cases.

3. Petitioners (joined by *amici*) next argue that this case presents the question whether an injunction can issue upon a mere showing that there is a "possibility of irreparable harm." That issue is irrelevant here. The district court found, and the court of appeals affirmed, that there was a *near certainty* of irreparable harm – a showing that far exceeds that required under *any* applicable standard or balancing test.

The district court's finding that NRDC had established "to a near certainty" irreparable harm "to the environment and Plaintiffs' standing declarants," as well as widespread irreparable species-level harm (App. 216a-217a), was amply supported by the record. As shown above, NRDC submitted extensive scientific evidence showing that MFA sonar causes serious, debilitating, and even lethal injuries to marine mammals and other species (*supra* § II). Petitioners do not contend that the district court's reliance on this mountain of evidence was clearly erroneous. Indeed, as the district court found, *even accepting the Navy's own take estimates in its EA,* the SOCAL exercises, as planned, presented a "near certainty" of widespread, irreparable harm and the Navy's proposed mitigation would be "woefully inadequate

and ineffectual" in preventing such harm. App. 217a, 215a.

The Ninth Circuit affirmed the district court's finding of a "near certainty" of irreparable harm under the well-settled abuse of discretion standard. App. 75a-77a. Petitioners' suggestion that the court of appeals somehow rejected the district court's finding, and instead made and relied on an independent finding of a "mere possibility" of harm (Pet. 28 n.3), ignores the court of appeals' affirmation that "the scientific studies, declarations and reports in the record confirm the district court's determination that irreparable harm to marine mammals will *almost certainly* result should the Navy be permitted to conduct its remaining exercises without appropriate mitigation measures." App. 87a (emphasis added).[1]

Besides being irrelevant, the argument of Petitioners and *amici* that the "possibility of harm standard" conflicts with the standard for preliminary injunctions employed by other circuits is considerably overstated.[2] While the circuits employ varying

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[1] The court of appeals, like the district court, also rejected Petitioners' assertion that only species-level harm can be irreparable – for which Petitioner's sole support consists of two cases holding merely that harm to a *single animal* was not sufficient. App. 77a; Pet. 27-28; *see*, *e.g.*, *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003) (holding that destruction of three bald eagle nests constituted irreparable harm). Nevertheless, the Ninth Circuit further held that even if a demonstration of irreparable injury at the "species-level" were required, NRDC met that burden here. App. 77a.

[2] This Court recently denied the Solicitor General's petition for certiorari on precisely this issue. *Earth Island Inst.*

terminology for the preliminary injunction calculus, all of these linguistic formulations express the same underlying equitable principle and none conflicts substantively with the Ninth Circuit's "possibility" formulation. In fact, three of the circuits on which Petitioners rely have used the "possibility" formulation. *See Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77, 85 (2d Cir. 1996) (plaintiff must "demonstrate that [he was] likely to suffer possible irreparable harm") (internal quotation omitted); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (irreparable injury prong satisfied "when the failure to grant preliminary relief creates the possibility of permanent loss"); *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (preliminary relief requires showing "the possibility of irreparable harm"). Indeed, this Court has affirmed injunctions based on a "possibility" or "likelihood" of irreparable harm. *See Brown v. Chote*, 411 U.S. 452, 456 (1973) (the district court "properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the possibility that irreparable injury would have resulted, absent interlocutory relief"); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) ("likelihood").

The Ninth Circuit's "possibility" standard, like the standard in most circuits, represents one end of a sliding scale whereby a higher showing on the merits reduces the required showing of harm, and vice versa. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005); 11A Charles Alan Wright,

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v. U.S. Forest Serv., 442 F.3d 1147 (9th Cir. 2006) *cert. denied,* 127 S.Ct. 1829 (2007).

Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.3 (2d ed. 1995). The Ninth Circuit joins all circuits in rejecting assertions of irreparable harm that are merely "speculative," "remote," "tenuous," "insignificant," or "insubstantial." *See Paramount Land Co. v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1012 (9th Cir. 2007) (vacating preliminary injunction); *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) (same); *see also* App. 75a-76a (rejecting Petitioners' assertion that irreparable harm in this case is merely "speculative").

None of the cases relied on by Petitioners demonstrates a meaningful conflict between the equitable balancing that occurs in the Ninth Circuit and that which occurs elsewhere. Chancellors in equity may express themselves differently, but all the formulations target the same equitable considerations. Petitioners' "conflicting" cases are either distinguishable on their facts or just different ways of saying essentially the same thing. For instance, *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802 (4th Cir. 1991), on which Petitioners rely, required a "clear showing" of irreparable injury, but cited the "likelihood of irreparable harm" as the standard to which this "clear showing" applies. *Id.* at 812; *see also Cordis Corp. v. Medtronic, Inc.*, 780 F.2d 991, 996 (Fed. Cir. 1985) (holding merely that the alleged injuries, *viz.*, patent damages and license fees, were not irreparable); *Borey v. Nat'l Union Fire Ins. Co.*, 934 F.2d 30, 35 (2d Cir. 1991) (holding only that the asserted injury – "potential monetary loss" – was not irreparable); *Siegel v. LePore*, 234 F.3d 1163, 1176-77 (11th Cir. 2000) (reciting a "substantial likelihood"

standard and affirming denial of injunctive relief because "threat" of harm was "wholly speculative"). Indeed, as seen above, three of the circuits on which Petitioners rely in suggesting a conflict also employ the "possibility" formulation.

Petitioners attempt to stretch language from *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) ("will suffer irreparable injury"), to suggest that only a showing of "actual harm" is sufficient for injunctive relief. Pet. 29. Petitioners' reading of *Doran* is belied by the result in that case, which found the irreparable harm standard met by the *possibility* that respondents would go bankrupt absent an injunction of the challenged ordinance. *Doran*, 422 U.S. at 932. Moreover, Petitioners' proffered standard – which would require plaintiffs to demonstrate the impossible: a certainty that actual harm will occur in the future – is contrary to this Court's jurisprudence (*Brown* and *Ashcroft*) and the standards used by every circuit court.

In short, the court of appeals' affirmance of the district court's finding of a "near certainty" of irreparable harm presents no issue that calls for this Court's review.

4. Contrary to Petitioners' assertions, the courts below properly weighed the "magnitude" of potential harm to the Navy, and gave both due deference and appropriate evidentiary scrutiny to the Navy's claims of harm in balancing the equities and carefully tailoring the mitigation order. As the court of appeals concluded, "there is significant evidence of the Navy's ability to successfully train and certify its strike groups under the conditions imposed by the district court." App. 86a.

As an initial matter, apart from two of the district court's measures – the safety zone and surface-ducting provisions – Petitioners have not even attempted to show concrete harm stemming from other aspects of the court's injunction. Indeed, the Navy has employed (assuming it is abiding by the court's injunction) the other four mitigation measures ordered by the district court during its three most recent SOCAL exercises, and it has not sought a stay of those measures. Thus, the Navy does not seriously contest the bulk of the mitigation measures ordered by the district court and affirmed by the court of appeals.

As to the safety zone and surface-ducting restrictions, there was abundant evidence supporting the district court's conclusion that those two measures were practicable, effective, and in the public interest. The feasibility of the 2200-yard safety zone is well-supported by the record. App. 82a-85a. The Navy has repeatedly implemented similar safety zones during other similar exercises and routinely employs a 2200-yard safety zone for low-frequency sonar training. App. 85a. The Navy's own after-action reports for the SOCAL exercises confirm that the 2200-yard measure would require the Navy to reduce its sonar only "approximately one more time per exercise" – far less than the five-fold increase that the Navy has misleadingly claimed. App. 84a. Still, the Navy claims that the number of shutdowns stated in its own after-action reports should be discounted because, it speculates, some of these shutdowns may have occurred during non-critical times. Pet. 31-32. But, as the court of appeals observed, this claim, too, is belied by the after-action reports, which "do not distinguish

between [critical and non-critical] shutdown events in evaluating training impacts" and thus provide no factual basis for that speculation. App. 84a n.65.

The Navy's claim that the six-decibel power-down measure during significant surface-ducting conditions will "prevent realistic training" (Pet. 32) is also contradicted by the factual record. Although Petitioners assert that "[t]raining in significant surface-ducting conditions is 'critical'" (Pet. 10), the Navy trained and certified its troops during all major exercises in SOCAL since July 2006 for which reports were released *despite the complete absence of these conditions*. App. 86a. Petitioners also speculate that this measure could disrupt training because surface-ducting could occur at an important time during the exercise. But none of the Navy's own 29 mitigation measures currently required by the Secretary of Defense – nor the surface ducting measure that it routinely employed during all exercises prior to January 2007 – contains a "critical times" exception. SER 183, 194-97. Moreover, the Navy regularly used similar, and even more onerous, power-downs in other conditions during previous exercises and was able to continue to train effectively despite such requirements (SER 186) – indeed, the Navy's current scheme contemplates that it will be able to continue to train effectively despite using power-downs as part of its safety zone. App. 225a-227a.

Petitioners nonetheless argue that the district court failed to give proper deference to the Executive's national security concerns in tailoring the injunction. Petitioners' view that deference to the Executive's military judgment is essentially absolute is contrary to this Court's long-established precedent.

App. 81a; *see Duncan v. Kahanamoku*, 327 U.S. 304, 322-23 (1946). Even in cases involving significant national security concerns, "deference is not equivalent to acquiescence" and courts have a duty to independently assess such claims and weigh them against competing interests. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998); *Coldiron v. U.S. Dep't of Justice*, 310 F. Supp. 2d 44, 53 (D.D.C. 2004). Judicial review of Executive assertions of harm takes on even greater importance in turbulent times when the balance of powers is most vulnerable to overreaching by the Executive. *See Duncan*, 327 U.S. at 322-23; *cf. Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring).

Here, the district court gave credence to the Navy's assertions of harm whenever plausible in light of the record, and rejected many of the measures that Respondents proposed based on the Navy's asserted training needs. *See*, *e.g.*, App. 103a-104a (opting to "forego broad geographical exclusions in favor of . . . a larger 'safety zone'" and more effective monitoring; rejecting limitations on nighttime and low-visibility training based on deference to Navy's asserted training needs). But while the Judiciary's review is deferential, it must also be meaningful. *Campbell*, 164 F.3d at 30 ("[D]eference is not equivalent to acquiescence."); App. 81a ("Nevertheless, a court's deference is not absolute, even when a government agency claims a national security interest."). As the court of appeals found, although the district court did not simply "acquiesce" in Petitioners' assertions, it gave ample deference to the Executive's expressed concerns. App. 79a-88a. The court of appeals thus properly affirmed this aspect of the district court's order.

Finally, while Petitioners attempt to couch their disagreement with the district court's fact-bound determinations as a legal issue regarding the application of "established equitable principles," Petitioners do not and cannot assert that the courts below failed to both recognize and apply these principles to the facts. Under the abuse of discretion standard, reviewing courts "are bound by the district court's resolution of conflicting evidence and other findings of fact." *FTC v. Simeon Mgmt. Corp.*, 532 F.2d 708, 711 (9th Cir. 1976) (Kennedy, J.); *see also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985). And "application of law to fact . . . is left to the factfinder, subject to limited review" even if there is "some tension in the various findings made by the courts below" *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996) (citations omitted).

The Navy relied almost exclusively on declarations prepared in the course of litigation. The district court was well within its discretion in crediting the voluminous substantive evidence submitted by Respondents of the Navy's actual past practices and statements predating the litigation, and in finding, with respect to the measures that it imposed, that the evidence in the record outweighed the Navy's assertions of harm. *See District of Columbia v. Murphy*, 314 U.S. 441, 456 (1941); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988); *Burger v. Kemp*, 483 U.S. 776, 806 n.11 (1987). Accordingly, further review of these fact-bound determinations is unwarranted.[3]

[3] The court of appeals also noted that "in the unlikely event" that the Navy is unable to train and certify its troops

B. The Court of Appeals Properly Rejected Petitioners' Reliance on CEQ's Invalid "Alternative Arrangements"

Petitioners assert that the district court was required to vacate its injunction after CEQ "consulted" with the Navy and proposed "alternative arrangements" for complying with NEPA, and the Navy agreed to abide by CEQ's proposal. The CEQ regulation on which Petitioners rely reads in its entirety:

> **Emergencies**. Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

40 C.F.R. § 1506.11.

After reviewing the effect of CEQ's actions on the factors bearing on the issuance of interim relief, the court of appeals correctly concluded that CEQ's action did not require the federal court to vacate its injunction. *First*, CEQ's factual findings were likely invalid under the APA because CEQ ignored all of the evidence in the extensive district court record that had persuaded the court that the tailored injunction would *not* prevent the Navy from effectively training and

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using the prescribed mitigation, the Navy "may return to the district court to request relief on an emergency basis." App. 89a.

certifying its troops. *Second*, CEQ's application of its regulation to the facts at issue could not be squared with the language and purpose of the governing statute, NEPA. *Third*, CEQ's unprecedented extension of its regulation to undo a district court's injunction grossly exceeded the "emergency" scope of CEQ's own regulation.

1. The court of appeals found that there was a serious question as to whether CEQ's action was invalid under the APA because the agency's fact-finding procedures and factual findings themselves were seriously and fundamentally flawed.[4] The court of appeals correctly questioned whether CEQ's flawed factual determinations were "arbitrary and capricious." App. 54a-55a.

CEQ's fact-finding "procedure" in this case consisted of summarily reviewing what it *knew* was an incomplete and partial record, and ignoring the extensive contrary evidence that was readily available. CEQ's findings were made after a closed *ex parte* proceeding in which CEQ considered a "record" consisting of only the Navy's evidence and arguments, omitting all contrary evidence. *See* App. 237a. As the court of appeals noted, CEQ deliberately ignored (or, at a minimum, failed to consider) the voluminous substantive evidence that the district court found persuasive and relied on in issuing its injunction. App. 54a-55a. *See Motor*

[4] The court's review of Petitioners' reliance on CEQ's actions, at this preliminary stage, did not require the court to reach a final determination regarding the validity of CEQ's action, but only to assess the effect, if any, of CEQ's action among the other factors bearing on the issuance of preliminary relief. *See Ashcroft*, 542 U.S. at 666.

Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (holding that agencies cannot "entirely fail[] to consider an important aspect of the problem" or fail to "examine the relevant data"); *Advocates for Highway and Auto Safety v. Fed'l Motor Carrier Safety Admin.*, 429 F.3d 1136, 1147 (D.C. Cir. 2005) (striking down agency action where the agency "simply disregarded volumes of evidence" contrary to its decision).

Based on this parody of objective fact-finding, CEQ went on to find that "the injunctive orders prevent the Navy from providing Strike Groups with adequate proficiency training and create a substantial risk of precluding certification," and on this basis concluded that an "emergency" existed under Section 1506.11. App. 238a-239a. This conclusion, as well as other factual conclusions of the agency (App. 234a, 238a-239a), directly contradicts the district court's finding, supported by a complete record, that the injunction would *not* prevent the Navy from effectively training and certifying its troops. *See* App 79a. Moreover, CEQ's cursory review of a partial record led it to predicate its finding of "emergency circumstances" on the false notion that the district court's order worked a complete prohibition on training. *See* App. 240a (" . . . failure to conduct this training exercise will have immediate ramifications …"), ignoring that the tailored injunction permitted the Navy to train with mitigation in place. This error is perhaps not surprising given the Navy's continued perpetuation of this fiction throughout its petition. *See*, *e.g.*, Pet. 17, 24, 25 (stating that the injunction proscribes the Navy from "conduct[ing] vital military exercises" until it completes an EIS; "prohibit[s] the

Navy's sonar use"; and "bar[s] the use of MFA sonar").

It is difficult to review the CEQ's procedure and analysis without concluding that CEQ was focused less on fact-finding than on providing ammunition for further litigation over the injunction. CEQ's fact-finding and analysis were arbitrary and capricious at best, and its issuance of alternative arrangements based on its hasty and one-sided review of the evidence did not compel the court to vacate its injunction.

2. Administrative agencies have no authority to interpret their regulations in a manner inconsistent with their governing statutes. *Stinson v. United States*, 508 U.S. 36, 45 (1993); *United States v. Larionoff*, 431 U.S. 864, 873 (1977). The court of appeals correctly concluded that if CEQ's emergency regulation were interpreted as broadly as Petitioners suggest, it would be contrary to NEPA and *ultra vires*. App. 50a-54a. The court properly construed the regulation narrowly to avoid this conflict. *Id.* Petitioners do not address, much less show error in this aspect of the Ninth Circuit's analysis, which forms an independent basis for the court's decision.

Congress enacted NEPA, "our basic national charter for protection of the environment" (40 C.F.R. § 1500.1(a)), to ensure that federal agencies "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. NEPA requires federal agencies to prepare an EIS for any major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Even significant national security concerns are insufficient to trump this clear statutory mandate.

Unlike other environmental statutes, NEPA contains no national security exemption. *See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1035 (9th Cir. 2006) ("There is no 'national defense' exception to NEPA.").

As shown above, Congress has reserved the power to decide when long-planned, specific activities should be immune from NEPA's requirements. *See supra* § III(A)(1) (and exemptions noted). In light of Congress' reservation of such NEPA-exemption authority to itself, the courts below properly declined to construe the CEQ regulation "so broadly as to independently authorize CEQ to do the same." App. 50a.[5]

NEPA requires all federal agencies – including the military – to comply with NEPA's substantive requirements "to the fullest extent possible." 42 U.S.C. § 4332. NEPA's "fullest extent possible" language requires compliance unless there is an "irreconcilable and fundamental conflict" between NEPA's requirements and those of another statute. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787-88 (1976). CEQ itself interprets section 4332 to mean that "each agency of the Federal Government shall comply with that section *unless existing law … expressly prohibits or makes compliance impossible*." 40 C.F.R. § 1500.6 (emphasis added). The legislative history confirms this

[5] At most, NEPA supports a narrowly drawn regulation to address situations in which a *bona fide* emergency renders the preparation and submission of environmental compliance documentation not "possible" within the meaning of the statute. 42 U.S.C. § 4332. This was CEQ's original intent in promulgating the regulation. *See* App. 46a-47a, 116a-118a.

interpretation. 115 Cong. Rec. (Part 29) 39702-39703 (1969); *see also Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971) (discussing legislative history).

Here there is no other statute preventing the Navy from complying with NEPA, and no obstacle rendering compliance "impossible." Although the Navy contends that NEPA must give way to its statutory obligation to be "organized, trained, and equipped" (10 U.S.C. § 5062), the court of appeals affirmed the district court's factual determination that the additional mitigation measures would *not* prevent the Navy from training effectively and certifying its troops. App. 79a. Moreover, the Navy is currently preparing an EIS for the SOCAL range, which demonstrates that it can both comply with NEPA and fulfill its other statutory obligations. App. 60a, 115a n.11. Because neither the mitigation order nor NEPA itself prevents the Navy from fulfilling its statutory mandate, there is no "existing law" or legal barrier of any kind that precludes the Navy from complying with NEPA. App. 52a-53a, 79a.

Courts have uniformly held that NEPA "does not provide an escape hatch for footdragging agencies" and "does not make NEPA's procedural requirements somehow 'discretionary.'" *Calvert Cliffs'*, 449 F.2d at 1114. If the governing statute "does not provide an escape hatch for footdragging agencies," certainly the implementing regulations cannot create that hatch. If Petitioners' view were the law, the military could simply forego NEPA compliance, await the inevitable court order, and then claim that environmental compliance is excused by the court's decision to

enforce the law. The court of appeals properly rejected the Navy's attempt to interpret CEQ's regulation in a manner that would, in effect, create a significant loophole in NEPA contrary to NEPA's language and all evidence of Congressional intent. App. 51a-52a.

3. The court of appeals also concluded that CEQ's attempt to apply its "emergency" regulation to effectively overturn a court-ordered injunction was contrary to the plain meaning and purpose of the regulation itself and thus invalid. App. 43a-48a. The Ninth Circuit's interpretation of the regulation was based on its examination of the numerous factors that courts routinely consider when interpreting regulations: "plain meaning," regulatory purpose, CEQ's guidelines interpreting the regulation, drafting history of the regulation, caselaw interpreting the regulation, CEQ's historical applications of the regulation, and the place of the regulation in implementing NEPA's statutory scheme. App. 41a-56a; *see also Rucker v. Wasbash R.R. Co.*, 418 F.2d 146, 149 (7th Cir. 1969); *cf. Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 599-600 (2004).

Petitioners assert that the courts below erred in failing to accord deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to the interpretation of the regulation advanced in Petitioners' briefs. While the court of appeals recognized that agency interpretations of their own regulations are ordinarily accorded "substantial deference," it concluded that no deference was due to Petitioners' interpretation here under at least four of this Court's articulated exceptions to this principle. App. 41a-

56a. *First*, as discussed above, Petitioners' interpretation conflicts with the plain language and manifest purposes and policies of the governing statute. *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974). *Second*, Petitioners' interpretation is contrary to the regulation's plain language and indicia of agency intent at the time of promulgation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). *Third*, the language of the regulation is not "ambiguous," and its clear language does not support Petitioners' interpretation. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). *Fourth*, Petitioners' interpretation is inconsistent with prior interpretations. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

In response, Petitioners claim that a single dictionary definition submitted by the Navy (which, unlike all the other definitions, defines "emergency" as "a situation demanding immediate attention") "should have been dispositive under *Auer*." Pet. 19.

This argument takes Petitioners nowhere. As an initial matter, even if Petitioners were correct that the court of appeals ought to have credited the Navy's preferred definition over the many others that define "emergency" to mean an "unexpected" or "unforeseen" occurrence (*see* App 45a n. 41, 112a-113a), it would not change the outcome here because the court of appeals affirmed the district court's factual finding that the situation was *not* one "demanding 'unusual or immediate action.'" App. 46a. Thus no emergency exists even under the Navy's preferred definition. Petitioners' claim that the emergency consists of a "court order demanding an EIS before vital military

exercises can proceed" (Pet. 19), simply ignores the fact that two federal courts have found, as a factual matter, that the order at issue does *not* prevent the Navy from successfully proceeding with its exercises.

Furthermore, even if the definition supported Petitioners' position, the citation of a single favorable definition does not require a court to ignore all other dictionary definitions and evidence of the term's meaning as used in the regulation. To the contrary, courts must determine the plain meaning of a word in light of the numerous factors that bear on its interpretation, and need not defer to outlying dictionary definitions that are contrary to plain meaning and ordinary usage. *See MCI Telecomm. Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 225-27 (1994). The court was well within its discretion in rejecting Petitioners' definition.

Petitioners also complain that the court of appeals erred in declining to "adjudicate" a definition of "emergency." Pet. 19. But this Court has made clear that a reviewing court should adjudicate definitional disputes only insofar as "necessary" to decide the matters before it, particularly in the posture of a preliminary injunction. *Ashcroft*, 542 U.S. at 665. The appellate court properly avoided proffering its own definition of the term because doing so was not necessary to its determination that CEQ's application of its regulation was outside the bounds of the ordinary meaning of the term. *See* App. 44a-45a & n. 41, 112a-115a.

Moreover, the definition of "emergency" to which Petitioners demand adherence was not proffered by CEQ, but by Petitioners. *Auer* applies only to an agency's own interpretation of its regulations. *Auer*,

519 U.S. at 462 (agency interpretation must reflect the agency's "fair and considered judgment on the matter in question"). But CEQ's letter to the Navy sets forth no formal, or even informal, definition of "emergency." The Navy is not charged with administering NEPA, and Petitioners' lawyers' post-hoc rationalizations of CEQ's analysis are not entitled to deference. *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971); *Bowen*, 488 U.S. at 212; *U.S. Air Tour Ass'n v. F.A.A.*, 298 F.3d 997, 1015-16 (D.C. Cir. 2002).[6] The Navy's preferred definition of the term need not even be deferred to, much less considered dispositive. *Id.*; *see also Wood v. Mukasey*, 516 F.3d 564, 568 (7th Cir. 2008); *City of Kansas City, Mo. v. Dep't of Housing and Urban Dev.,* 923 F.2d 188, 192 (D.C. Cir. 1991).

Auer deference was also inappropriate because both of the courts below correctly found that CEQ's application of its regulation to effectively overturn an Article III court order would raise "serious" constitutional issues under Separation of Powers doctrine. App. 55a n.47, (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792)); App. 122a-124a. The courts below properly avoided these serious constitutional issues, applying constitutional avoidance doctrine. *Id.* Notwithstanding *Auer* or any otherwise-applicable deference principles, courts must interpret statutes and regulations to avoid serious constitutional issues unless Congress itself has expressly called for the constitutionally suspect

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[6] The listing of CEQ's counsel on the certiorari petition does not alter this fact. *Adair v. United States*, 497 F.3d 1244, 1252 (Fed. Cir. 2007).

interpretation. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). Congress has not done so here. The court of appeals thus properly refused *Auer* deference and rejected Petitioners' broad interpretation to avoid the serious likelihood that the regulation will be held unconstitutional. *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909).

Not only was CEQ's disregard of the district court's findings constitutionally suspect, it was also improper for CEQ to venture to overrule the district court's factual conclusions about the feasibility and minimal burden of its injunctive measures – a matter over which CEQ clearly had no particular expertise. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002) (holding that an agency's interpretation in a matter "so far removed from its expertise merited no deference from this Court").

Petitioners further assert that, even apart from *Auer* deference, the court of appeals' interpretation was contrary to interpretations of the regulation offered by other courts and that its determination creates a circuit-split with the D.C. Circuit's decision in *Nat'l Audubon Soc'y v. Hester*, 801 F.2d 405 (D.C. Cir. 1986). Pet. 14. These claims are unfounded.

The facts and legal posture of *Hester* could not be more different from this case. In *Hester*, the Wildlife Service was forced to take immediate action in order to prevent the imminent disappearance of the California Condor, an endangered species. In upholding the agency's action – for reasons wholly independent of the alternative arrangements propounded by CEQ – the D.C. Circuit stated that

when considering the validity of agency actions under NEPA, "judicial review of agency decisionmaking is at its most deferential where, as here, the agency action is based *solely* upon environmental considerations." *Hester*, 801 F.2d at 407-08 (emphasis in original). The "alternative arrangements" were merely cited in a footnote as a possible alternative basis for upholding the agency's action. Petitioners' purported "conflict" between the instant case and *Hester* arises not from *Hester's* holding, but from Petitioners' strained interpretation of dicta stated in a footnote. *Id.* at 408 n.3. Petitioners, divorcing this footnote from the context of the rest of the opinion, attempt to create a conflict where none exists. In any event, a circuit split cannot be created by conflicting dicta. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

The court of appeals and district court carefully reviewed *Hester* along with the other cases decided under Section 1506.11 and, in every instance, found the cases fully consistent with their conclusions. App. 48a-50a; 113a-115a. Indeed, no court has ever found a bona fide "emergency" arising from an order of an Article III court. Nor is there any caselaw – or, indeed, any previous application of the regulation – finding an "emergency" when an agency, which had more than sufficient time to comply with the statute, failed to prepare required environmental analysis for long-planned activities.

Petitioners' cases finding emergencies in "foreseeable" circumstances (Pet. 18) are off-point, both because none involves the specific regulatory provision at issue here and because the Ninth

Circuit's determination was based on considerations far beyond the predictability of any particular event. The "foreseeable" air traffic controllers strike in *Letenyei v. Dep't of Transp.*, 735 F.2d 528 (Fed. Cir. 1984), for instance, was not a self-created emergency, not precipitated by a court order, and not caused by an agency's failure to comply with the law for its long-planned activities.

Moreover, even if Petitioners' interpretation of the regulation were accepted, CEQ's "alternative arrangements" would still be arbitrary and capricious, because they were not limited to "actions necessary to control the immediate impacts of the emergency," as the regulation requires. First, while the Navy has alleged harm stemming from only two of the court's measures, CEQ's alternative arrangements jettisoned *all* of the district court's prescribed mitigation. Second, CEQ purported to excuse the Navy from compliance with NEPA prospectively through January 2009, even though a full year is not "necessary" to control any "immediate" impacts. 40 C.F.R. § 1506.11. And, as the court of appeals noted, the Navy's five-month delay in seeking alternative arrangements after the district court's injunction belied its asserted need for any "emergency" measures. App. 45a-46a.

Finally, Petitioners assert that the court of appeals erred in applying an "abuse of discretion" standard in assessing the district court's legal conclusions, rather than de novo review, and assert a circuit-split based thereon. Pet. 20. This argument is a red herring. The "abuse of discretion" standard, as consistently interpreted and applied by the Ninth Circuit and all other circuits, calls for *de novo* review

of legal conclusions and *clear error* review of factual conclusions. *Int'l Brotherhood of Teamsters v. N. Am. Airlines*, 518 F.3d 1052, 1055 (9th Cir. 2008) ("We review a district court's grant or denial of a preliminary injunction for an abuse of discretion. We review the district court's findings of fact for clear error, and its conclusions of law de novo.") (citations omitted); *accord Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990). There was no error in the court of appeals' application of these settled standards here. *See*, *e.g.*, App. 48a.

IV. CONCLUSION

The petition for a writ of certiorari should be denied.

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